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DISCLOSURE OF INFORMATION IN CRIMINAL PROCEEDINGS

A comparative analysis of national and international criminal procedural systems and human rights law

Brando Matteo Fiori

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university of groningen

Disclosure of Information in Criminal Proceedings

A comparative analysis of national and international criminal procedural systems and human rights law

PhD Thesis

to obtain the degree of PhD at the
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on the authority of the
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and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 26 March 2015 at 16.15 hours

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Introduction

1. The subject of the study

This work analyses the disclosure of information in national and international criminal proceedings. One of the major problems faced by all procedural systems is how to deal with a lack of information, who is responsible for the gathering of information, and what the consequences are when vital information is not disclosed.
Disclosure is a complex legal issue that covers different branches of law as it involves procedural aspects as well as considerations that belong to the realm of human rights law. In fact, rules regulating the functioning of the disclosure process are an important element of any procedural system and their investigation assists in appreciating the different ways in which disclosure can be achieved as well as highlighting their strengths and weaknesses.
Having said that, disclosure is one of the most important steps in the preparation of the defence enshrined in Article 6 of the European Convention on Human Rights; it goes to the heart of the fairness of criminal proceedings. Withholding certain material significantly affects the fairness of the proceedings, sometimes to a degree that cannot be remedied.

A democratic society must act firmly against those who have committed a crime but it is equally important that it shows that its criminal system guarantees their fundamental rights. Indeed, "society wins not only when the guilty are convicted but when criminal trials are fair".[1] Therefore, criminal proceedings must provide several core rights to the accused and defend them against possible abuses. Among these rights, the right to disclosure holds a prominent position.

Disclosure is also the practical manifestation of the principle of the equality of arms. The prosecutor, who enjoys more investigative resources, is compelled to disclose information and material relevant to the defence. Without the prosecutor's disclosure of this material, the defence would have no access to certain information. Disclosure obligations reduce the structural gap that exists between the two parties.

Disclosure is the act or process of revealing or uncovering; it brings to light what could not be seen before. It is an essential feature of any criminal proceeding and it must be assessed against the background of a procedural system as a whole. Disclosure allows the defendant to gain knowledge of the case against him and therefore puts him in the position to mount an informed defence. At the same time, the issue of disclosure is also relevant when it is tackled from the perspective of the prosecutor and even from that of the judge. It therefore requires a thorough analysis of the legal and cultural characterisation of the role of these figures in a criminal law system.
Moreover, the way disclosure is structured is influenced by the legal tradition of the system in which it operates. Systems of common law origin adopt complex

[1] US Supreme Court, *Brady v Maryland* 373 US 83 (1963), para. 87.

technical rules or provisions while civil law systems embrace an open case file or dossier approach. Furthermore, some criminal systems imported elements of another procedural background showing trends and possible evolution in the regulation of disclosure.

While disclosure is an essential feature of criminal proceedings, it is not an absolute right. Circumstances exist that may justify restrictions to the right of disclosure. Disclosure in fact involves balancing different and sometimes competing interests. For instance, the interest of safeguarding an ongoing investigation or the interest in protecting witnesses as opposed to the interest of the defendant to gain knowledge of information. Such scenario calls all the different actors in a criminal trial into play, namely the defence, the prosecutor and the judge.
In addition to this, disclosure of information plays a crucial role in facilitating the efficiency and expeditiousness of the proceedings. Poor disclosure generates lengthy and time-consuming litigation that affects the smooth conduct of a criminal trial sometimes to the extent that it hampers the reaching of a verdict.

These few preliminary remarks already allow appreciation of the complexity of the subject, to depict the perspectives from which the analysis of disclosure is carried out in this research project and at the same time to introduce the context of this work.

2. The scope of the study

The purpose of the study is to scrutinise and evaluate the regulation of disclosure in national and international procedural systems in order to gain knowledge of the different ways in which the disclosure of information can be achieved.
The comparative analysis will draw the lines of the scrutiny conducted singling out and addressing the different main critical aspects of the disclosure of information that each system presents.
The jurisprudence[2] of the European Court of Human Rights (ECtHR) on the right to a fair trial and, more specifically, on the disclosure of information provides the background against which these systems can be evaluated.
Throughout this process, several questions arise such as: what is the influence that different legal traditions such as common law and civil law exercise on disclosure? What role should the defence, the prosecutor and the judges play in the disclosure process? What judicial supervision, if any, should be envisaged in the disclosure process and at what stage? How can disclosure be accommodated with competing interests? What should the consequences of disclosure violations be?
Finally, taking on board the results of the research and the answers that the systems investigated provide to these and other legal questions in their criminal procedure, an attempt is made to suggest possible improvements in the regulation of disclosure in criminal proceedings.

[2] Aware of the different legal meaning of the terms "case law" and "jurisprudence" I chose to use them interchangeably in this work.

3. The method

The research project investigates, on a comparative basis, the rules of procedure and evidence regulating disclosure in five criminal procedural systems. Three of these systems are national and two international.

The choice of the systems has been guided by the intention to offer a representative sample of the different possible ways to achieve and regulate disclosure in criminal proceedings. As far as the national plane is concerned, England, Italy and France have been selected. England and France as representatives of the common law/civil law divide and Italy as it adopted a criminal procedure code that moved towards an adversarial procedure rather than the long-standing inquisitorial tradition. In relation to this part of my research, I drew on my experience as a lawyer in Italy and several meetings with a number of specialists, lawyers and judges, who provided me with helpful and accurate feedback and information about my work.

As far as the international plane is concerned, the International Criminal Tribunal for the Former Yugoslavia (ITCY) and the International Criminal Court (ICC) were chosen among the numerous international and internationalised courts and tribunals which have soared in number over the past twenty years. The ICTY was chosen due to its extensive experience and its significant jurisprudential contribution to the development of disclosure in international criminal proceedings. The ICC was selected because of its permanent nature, the innovative features of its procedural structure and because disclosure has already played a substantial role in several of its proceedings.
As far as this part of the research is concerned, I benefited from my internship in the Trial Chambers of the ICTY.

The analysis of the jurisprudence of the European Court of Human Rights on the right to a fair trial and on the issue of disclosure is an important component of this research. In fact, it allows the singling out of some of the critical aspects of disclosure stressing its solid nexus with human rights law as well as appreciating the contribution that the ECtHR's jurisprudence gave to the development of disclosure in criminal proceedings. In fact, while the Strasbourg Court does not tell us which is the preferable way to regulate disclosure it makes clear which features of a criminal procedure conflict with the right to a fair trial and with the right of disclosure. The jurisprudence of the Court is therefore of assistance in the assessment of the disclosure process in national systems and that is why the procedural systems chosen are all subjected to the jurisdiction of the Court. However, also in relation to the international criminal bodies scrutinised in this work the ECtHR case-law is useful considering that, even if they are not bound by its jurisprudence, their legal instruments enshrine the obligation to respect the right to a fair trial. In relation to this segment of the research, I could benefit from my professional experience as a lawyer in the Registry of the European Court of Human Rights that equipped me with unique first-hand experience of the functioning of the Court and it allowed me to advance my knowledge of its jurisprudence.

The pattern followed and the order chosen in the redaction of the chapters present the characteristics of a pyramid structure where the analysis of the three domestic legal systems, through the filter of the jurisprudence of the European Court of Human Rights, guides us to the international plane.
Each of the procedural systems investigated presents its own peculiarities and in order to assess the rules regulating the disclosure process it is necessary to gain an understanding of the functioning of the whole system. To this end, each chapter provides a description of how the procedures developed over time as well as an overview of their current operative framework. Having become familiar with the context in which the obligations to disclose are discharged it will then be easier for the reader to understand the description and the analysis of the rules and legal provisions regulating the disclosure of information in the system assessed which are provided in each chapter. The analysis will give account of the different aspects that the prosecutor, the defence and the judges present in the system scrutinised as well as of the ramifications that these differences bear in relation to the disclosure process.

Finally, against this background an attempt is made to suggest possible improvements of the current regulation of disclosure. Particular attention is devoted to modern international criminal proceedings due to their relatively young age as well as in the light of the ongoing debate about the possibility of establishing a single common criminal procedure applicable to all international criminal courts and tribunals.

The research for this work ended in May 2014.[3]

3 However, in the context of the English/Welsh criminal procedural system, reference has been made to the latest edition of the Criminal Procedure Rules that entered into force on 6 October 2014.

I. Disclosure of information in the English/Welsh criminal law system

Introduction

> "Non-disclosure is a potent source of injustice and even with the benefit of hindsight it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence..."[1]

> "...in our adversarial system in which the police and the prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial."[2]

These two statements summarise the essence and the complexity of common law regarding disclosure. The adversarial system is based on a construct envisaging two parties preparing their own case in the pre-trial stage and presenting it at trial, referred to as the "two cases approach".[3] The system relies on the presumption that in criminal proceedings both parties to a trial enjoy roughly equal resources to guarantee the fairness of the trial.[4] While this presumption sounds less naïve when a trial is ongoing, it is rather unsound when considered in relation to the pre-trial stage where the prosecutor has investigative resources and powers at his disposal that no defendant will ever be able to match. Consequently, the only possible remedy to this rather significant disparity is the obligation upon the prosecution to make available all the material gathered that might assist the defence in the preparation of its case.[5]

This in turn involves a deeper consideration of the role that the prosecution is expected to play in the criminal justice system. The responsibilities that rest on the prosecution have blurred the edges of the adversarial system in the name of the fair administration of justice; the prosecutor is requested to perform tasks that might benefit the opponent.[6] Furthermore, when the prosecutor decides what material has to be disclosed he performs acts that are administrative rather than judicial in character.[7] In a purely adversarial system there would be no or limited room for disclosure obligations. The prosecution, in fact, would focus exclusively on building its case. Despite the reforms that have taken place in common law on disclosure and the introduction of some sort of judicial supervision the tension between the cultural tradition of the prosecution and the duties placed upon him in relation to disclosure remain vivid.

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1 *R* v *Ward*, (1993) 96 Cr App R 1, Judgment, p. 22.
2 *R* v *Brown*, (1995) 1 Cr App R 191, Judgment, p. 198.
3 Schuon C., *International Criminal Procedure a Clash of Legal Cultures*, T.M.C. Asser Press, 2010; Heinze A., *International Criminal Procedure and Disclosure: An Attempt to Better Understand and Regulate Disclosure and Communication at the ICC on the Basis of a Comprehensive and Comparative Theory of Criminal Procedure*, Dunker & Humblot, Berlin, May 2014, p. 110.
4 Report to the Home Secretary on *Evidence of Identification in Criminal Cases,* (HC 338, London: HMSO, 1976) para. 1.17.
5 Niblett J., *Disclosure in Criminal Proceedings*, Blackstone Press Limited, 1997, p. 14.
6 Plater D., *The Development of the Prosecutor Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?,* The University of Tasmania Law Review, Vol 25, No. 2, 2006. Also Niblett, above n. 5 and *R* v *Preston*, (1994) 98 Cr App R. 405, p. 415.
7 *R* v *Preston*, above n. 6.

Disclosure is a complex topic also because of its intrinsic imperfection caused by the fact that the system entrusts a party to a trial with the discretion to decide on what to disclose to the other side. It is therefore difficult, if not impossible, to assess with absolute certainty in each case whether material that should have been disclosed was indeed disclosed. Disclosure has been characterised as the "battleground of the modern legal system".[8] In the English/Welsh legal system, the law on disclosure has evolved and changed constantly over the past thirty years. Both common law and statutory law have boosted this process trying to correct the faults in the system.

For the purposes of the present analysis disclosure can be divided into three categories: pre-trial prosecution disclosure, prosecution disclosure of unused material and defence disclosure. In relation to the first category, the principle that the prosecution needs to disclose its case to the accused before the trial begins is settled and uncontroversial in the English/Welsh criminal justice system. An accused has the right to know what material the charges against him are based on. Without knowledge of the prosecution's case the defence cannot effectively prepare for trial. Interestingly enough it has not always been so. Disclosure of the prosecution's case, which in modern criminal procedure is a basic right of the accused, was not contemplated by the system in early modern age trials (sixteenth and seventeenth century). In fact, as it will be seen, it was believed that an accused could only benefit from the ignorance of the case against him as the spontaneity (and therefore genuine) of his reaction was considered the key element of an effective defence.

Things are more complicated in relation to prosecution's disclosure of unused material, which is material generated and gathered during an investigation that will not be part of the prosecution's case. It is in this area that disclosure law has witnessed the most change over the past thirty years. Disclosure of unused material may require finding the balance between the right to a fair trial and the protection of the public interest. This equilibrium comes under scrutiny when the prosecution intends to withhold material on public interest grounds. This scenario leads to another delicate matter concerning the adoption of effective safeguards of the rights of the accused in the context of prosecution ex parte applications seeking non-disclosure.

Finally, the Criminal Procedure and Investigation Act (entered into force in 1997) introduced specific disclosure obligations for the defence in the criminal procedure. This was a remarkable departure from the adversarial tradition where the prosecution has to prove its prima facie case with no cooperation of the defence whose attitude was passive and limited to responding to the prosecution's case. The ratio behind defence's disclosure is that by clarifying and defining issues of the case it can contribute to its fairness. Defence practitioners opposed the introduction of defence disclosure obligations, as they are perceived to be going against the adversarial tradition and to disadvantage the accused.

8 Zander M. and Henderson P. (1993) Crown Court Study, Research Study No. 19, Royal Commission.

This section focuses on the prosecution's duty to disclose unused material and the defence's disclosure obligations. A brief introductory description of the trials in the early modern age and the first appearance of disclosure provisions is the starting point of the analysis. This description will assist in understanding the opposite conceptions of disclosure which characterise the modern English/Welsh criminal procedure. Scrutiny of the jurisprudence's main contribution to the development of the current disclosure process is carried out and it is followed by an analysis of the main statutory laws on disclosure in order to shed light on the role played by the police, the investigators, the prosecution and the defence in the disclosure scheme. Finally, an assessment of the case law of the European Court of Human Rights involving the United Kingdom and its disclosure process in criminal proceedings is provided. A chronological approach is followed in the analysis of the common law and statutory law on disclosure before discussing the public interest immunity procedure and the legal issues related to it. The analysis is limited to the procedure followed in Crown Court trials which deal with the most serious criminal offences.

1. The origins of the duties to disclose in criminal trials

The adversarial legal system is the defining feature of the English/Welsh criminal justice system based on English common law. English criminal trials from the seventeenth to the early twentieth century were very different from those of today. The work of Langbein, which provides a detailed account of these proceedings have been largely used in this section.[9]

In the sixteenth and seventeenth century (the so-called early modern period) the criminal procedure of England relied on the principle that an accused should defend himself without the services of an attorney. The criminal trial was a "lawyer - free contest of amateurs".[10] The victim of the crime (or his family in murder cases) would prosecute the case and the accused would defend himself without the assistance of a professional lawyer. The responsibility for reporting crimes and gathering evidence was placed on the victims as until the third decade of the nineteenth century in London there was no police force that could perform these tasks.

The main function of the trial was to grant an opportunity to the accused to confront the prosecution's case and the evidence gathered against him. In order to do so he had to give his own version of the events at the trial. The accused was not granted the right to remain silent but, on the contrary, he was considered a source of information. His genuine reaction to the charges against him was the key element for the jury to assess whether he was innocent or guilty. The most significant corollary to this conception of the trial was that the accused had to remain ignorant of the prosecution's case and the evidence collected against him until confronted with it at trial. Disclosure of information was therefore a concept

9 Langbein J.H., *The Origins of the Adversary Criminal Trial*, Oxford University Press, 2003. Also Baker J. H., *An Introduction to English Legal History*, Butterworths Lexis Nexis, 2002; Beattie J.M., *Policing and Punishment in London 1660-1750*, Oxford University Press, 2001; King P., *Crime, Justice and Discretion in England, 1740 – 1820*, Oxford University Press, 2000; May A.N., *The Bar and the Old Bailey, 1750-1850*, Chapel Hill, The University of North Carolina Press, 2003; Bentley D., *English Criminal Justice in the Nineteenth Century*, London: The Hambledon Press 1998; Post J.B., *The Admissibility of Defence Counsel In English Criminal Procedure,* The Journal of Legal History, 5:3, 23-32.

10 Langbein, above n. 9 at p. 11.

foreign to the criminal procedure. When the accused had to enter his plea the indictment was read to him for the first time. The absence of previous disclosure was considered beneficial to the accused as only through spontaneous reactions to the prosecution's case could he prove his innocence.[11]

The rule against the defence counsel must be contextualised as it applied only to matters of fact. The engagement of a lawyer by a defendant was allowed in relation to matters of law whereas the realm of facts were inaccessible to lawyers as it was believed that no lawyer could speak about the events of the case better than the defendant. Consequently, lawyers had a role in the pre-trial phase, which would lead to the plea of the accused. In fact, pleading guilty or not guilty was a matter of law. Nonetheless, also in the pre-trial stage legal assistance was not effective as lawyers experienced limits on access to their client. Furthermore, the opportunity to elaborate any objection to the indictment was slim considering that the indictment was read to lawyers and the accused for the first time when the latter was called to enter a plea. The trial was about facts and the accused was the sole protagonist. The (false) assumption was that every person accused was able to defend his own case by effectively speaking of the facts and cross-examining witnesses.
Both parties could call witnesses although only the prosecutor's witnesses were sworn in before giving testimony. The accused and his witnesses did not render their testimony under oath. Clearly, this difference affected the credibility of both the defendant and his witnesses. In addition, the prosecution's witnesses could be summoned by the judge to compel them to appear in court whereas such possibility was not granted to the accused.

The absence of professional lawyers from the scene of the trial conferred a relatively active role on the judges. The judges could detect, motu proprio, procedural flaws in the prosecution conduct. Defendants were often uneducated and unable to put forward effective, if any, cross-examination. Occasionally judges intervened and examined witnesses on behalf of the accused. They also summed up the case for the jurors at the end of the trial. It was not uncommon for a judge to recommend a certain verdict to the jury or shared his opinion about the case and its most welcome outcome with the jurors. Until the last quarter of the seventeenth century the judges could fine jurors who failed to return the verdict they had been advised to return. The judges were active in the management of the trial. Their role went far beyond that of an impartial umpire as modern English criminal procedural law conceives it.

Juries heard up to twelve cases before retiring to deliberate. The average time for a case to be tried including the verdict was less than twenty minutes.[12] The jury returned the verdict and determined the appropriate sentence in case of guilt. The accused could not put his arguments before the jury in what later would become a sentencing hearing as he could only speak in relation to facts.

11 Ibid. at p. 15.
12 Ibid. at p. 16.

Summing up, the trial was an altercation between the victim and the accused. The core element of the trial was the accused speaking about the facts of the case. He was a source of information for the judge and the jurors. This was the English criminal trial's major concern in the early modern age. Contemporaries considered the unpreparedness of the accused essential for the effectiveness of the proceedings. Spontaneity was the key element of the truth finding process. Lawyers were perceived as a threat to the status quo and therefore their engagement was strictly limited. Disclosure of information and evidence to the accused was a danger to the effectiveness of the system and therefore needed to be avoided. The unfairness of the altercation system was not evident when compared to the Middle Ages.

2. The 1696 Treason Trials Act and the first disclosure obligation

The altercation system was proven flawed when some major treason trials, between 1678 and 1685, resulted in the false convictions of innocent persons.[13] These major miscarriages of justice caused deep concern over the criminal procedure followed in treason trials. The response to these concerns was the adoption of the 1696 Trial Treason Act, which introduced a duty of disclosure for the prosecution. The defendant was in fact granted the right to obtain a copy of the indictment at least five days before the commencement of the trial. This first disclosure obligation did not encompass the names of the witnesses the prosecution intended to call. The disclosure of the indictment to the defendant enhanced the effectiveness of the assistance of a lawyer in the pre-trial phase. It gave the opportunity to the defendant and his lawyer to analyse and comprehend the charges in the indictment and eventually to detect flaws of law.

The Treason Trials Act granted the accused the right to counsel during the trial.[14] In 1730, judges began permitting legal representation for defendants in felony cases.[15] Interestingly, this fundamental change from the previous system did not occur through legislation but rather through the judicial management of the cases. The advent of lawyers in felony trials soon led to the gradual silencing of the accused. The adversarial trial became a trial governed by lawyers who used their skills to blur the distinction between matters of facts and matters of law. The Prisoners' Counsel Act of 1836 allowed defence lawyers to address the jury. A side effect of the progressive silencing of the accused due to the predominant role acquired by defence counsel was the affirmation of what is now known as the privilege against

13 Three sets of trials outraged the public and shocked England: a) The Popish plot of 1678 where a perjurer alleged that there existed an extensive Catholic conspiracy to assassinate Charles II. These accusations eventually led to the execution of at least 15 innocent men. See Kenyon J., *The Popish Plot,* 2d ed., 1985, repr. Phoenix Press 2001 and Pollock J., *The Popish Plot: A Study in the History*, Kessinger Publishing, 2005; b) The Rye House Plot of 1683 which was a plan to assassinate King Charles II of England and his brother. The treason trials arising from this plot led to the conviction and execution of two leading figures of the Whig party. See Greaves, R.L. *Secrets of the Kingdom: British Radicals from the Popish Plot to the Revolution of 1688-89* (Stanford University Press) 1992 and Milne D.J., *The Results of the Rye House Plot and Their Influence upon the Revolution of 1688: The Alexander Prize Essay Transactions of the Royal Historical Society* 5th Series, 1 (1951), p. 91-108; c) The Bloody Assizes, which were a series of trials started at Winchester on 25 August 1685 in the aftermath of the Battle of Sedgemoor, which ended the Monmouth Rebellion in England. Over 1,000 rebels were in prison awaiting the trials, which started in Winchester on 26 August. The first notable trial was that of an elderly gentlewoman called Dame Alice Lyle.http://en.wikipedia.org/wiki/Bloody_Assizes - cite_note-som-2#cite_note-som-2 The jury reluctantly found her guilty, and the law recognising no distinction between principals and accessories in treason, she was sentenced to be burned. This was commuted to beheading, with the sentence being carried out in Winchester marketplace on 2 September 1685. See Dunning R., *Monmouth Rebellion: Guide to the Rebellion and Bloody Assize*, Dovecote Press, 1984.

14 Langbein, above n. 9; Baker, above n. 9 at pp. 93-96. See also Bentley, above n. 9.

15 Langbein, above n. 9; Baker, above n. 9 at p. 106-177.

self-incrimination.
In the adversarial criminal procedure, judges gradually lost their judicial activism and assumed the modern role of impartial umpires arbitrating the contest between barristers. By the end of the eighteenth century, the focus of the trial in the adversarial system had shifted from the defence's case to that of the prosecution. In the altercation system, the trial was an opportunity for the defendant to confront the charges and the evidence put before him, which were not disclosed in advance. With the affirmation of the adversarial procedure and the silencing of the accused the main question was whether the prosecution's case would prove solid once the defence counsel had tested it at trial.

3. The development of the common law on disclosure

Until 1946 there was no authority validating the assumption that the prosecutor had a duty to disclose material in his possession to the defence.[16] There are two categories of material held by the prosecution: the evidence and the unused material. The former is the material the prosecution intends to rely on in order to prove his case. The second includes all the other material gathered in a criminal investigation that the prosecution does not intend to use at trial. This material could prove useful to the defence nonetheless.

As far as the evidence is concerned, the prosecution's duty to disclose the case against the accused is settled and uncontroversial. On the other hand, disclosure of unused material has been a hotly debated topic. Until 1982, the obligations imposed on the prosecutor to disclose unused material were rather limited.[17] The system placed great trust on the prosecution's integrity and fairness in assessing the material in his possession. The jurisprudence of the English criminal courts was the engine that led to the introduction of the prosecution's duties into the criminal procedure to disclose to the defence evidence and material that is relevant to the case even if it will not be part of the prosecution's case.

In 1946 the Court of Appeal delivered the Bryant and Dickson judgment which marked the shift from the idea that the system itself guaranteed the fairness and impartiality of those who acted on behalf of the Crown in criminal cases to the conception of disclosure as a fundamental right of the accused.[18] Interestingly enough the case was a civil case and not a criminal one. This is not extraordinary considering that disclosure was common practice in civil proceedings in the twentieth century whereas it found no place in criminal proceedings. In Bryant and Dickson the plaintiff, who had been acquitted in a previous criminal judgment, claimed that the police had acted maliciously by withholding exculpatory material. Specifically, he claimed that a witness statement that should have been disclosed by the prosecution had been kept from him. The Court of Appeal set the first prosecution disclosure obligation stating that in a criminal case the prosecution

16 Report to the Home Secretary on *Evidence of Identification in Criminal Cases,* above n. 4 at para. 5.
17 Corker D. and Parkinson S., *Disclosure in Criminal Proceedings*, Oxford University Press, 2009, p. 1.
18 *R* v *Bryant and Dickson*, (1946) 31 Cr App R 146.

has the duty to "make available to the defence a witness whom the prosecution know can, if he is called, give material evidence."[19] The standard was rather low as the judges found that the prosecution had no obligation to disclose to the defence the statement that was eventually made by the relevant witness, but only to make the witness available to the defence. This ruling was absorbed into criminal cases.

Almost twenty years went by before another civil judgment broadened the prosecution's duty of disclosure. In 1965 the Court of Appeal heard the Dallison v Caffrey case where, again, the plaintiff claimed that the police had maliciously withheld a witness statement that corroborated the accused's alibi.[20] The prosecution responded by showing its compliance with the Bryant and Dickson standard. It had indeed provided to the defence the witness's name and address but not the statement. However, the judges found that the duty of a prosecuting counsel or solicitor was such that "if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence". [21]

The judgment broadened the prosecutor's obligation to disclose requiring him to supply the defence not only with the details of a relevant witness but also his statement. An important distinction was drawn between witnesses considered credible and those whose reliance was considered scarce by the prosecutor. In the latter case, the names and whereabouts of the witness would suffice to comply with the disclosure standard. Obviously, a credible witness statement that strengthens the alibi of an accused must be disclosed. "It would be highly reprehensible to conceal from the court the evidence which such a witness [a credible witness] can give".[22] Therefore, although the prosecution had abided by the Bryant and Dickson standard the Court of Appeal found that it was not sufficient to guarantee justice was served. Justice and fairness had to be the guiding light in matters concerning disclosure and not the literal reading and application of the law. The accused's right to disclosure rather then the integrity of the prosecution was now considered to be the best guarantee of a fair criminal trial.[23]

Finally, in the case of R v Hennesy the Court of Appeal remarked the importance of full disclosure by the prosecution stating that "those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence."[24]

Concluding, the above case law shows that the disclosure process involved only the prosecutors that were entrusted with discretion in deciding what ought to be disclosed to the defence. In discharging his responsibility, the prosecutor had to look beyond the literal interpretation of the rules and let the overall fairness of the trial guide him through the process.

19 Ibid. at 151.
20 *Dallison* v *Caffrey,* [1965] 1 QB 348.
21 Ibid. at 369.
22 Ibid. at 369.
23 Corker and Parkinson, above n. 17 at p. 7.
24 *R* v *Hennessy* (1979) 68 Cr App R 419, at 426.

4. The 1981 Attorney General's Guidelines

The first government attempt to codify the rules of disclosure and to define their functioning occurred in December 1981 when the Attorney General issued a set of guidelines. They did not have the force of law and were the product of a working group appointed in 1972 given the task of investigating new policies and practices for the discharge of the prosecution's duties to disclose unused material. The guidelines broke up the judiciary's monopoly in the development of the disclosure regime in the criminal justice system.[25]

The Attorney General guidelines defined "unused material" as:
"(i) All witness statements and documents which are not included in the committal bundle served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at the committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles."[26]

Any item falling within this definition was to be made available to the defence if "… it ha[d] some bearing on the offence(s) charged and the surrounding circumstances of the case".[27] The standard adopted to define the category of material that the prosecution was under a duty to disclose could not be wider. The timeline for disclosure was not strictly defined and the guidelines stated that disclosure had to be made as soon as possible before the date set for the beginning of the trial.[28] However, the prosecution was granted the discretion to withhold material in several cases.[29] The exercise of such discretion was regulated with no reference to the Court or the defence. The idea underlying the guidelines was that the prosecution "could be trusted to do what was right and proper". [30]

Non-disclosure was allowed when: (i) disclosing a statement might lead to the intimidation of a witness; (ii) the statement is believed to be wholly or partly untrue and might be of use in cross-examination if the witness is called by the defence; (iii) the statement is favourable to the prosecution who, nonetheless, fears that its disclosure might lead to the witness giving false account that is favourable to the accused; (iv) the statements is quite neutral but it is feared that the witness might change his story and give evidence for the defence.[31]

Furthermore, the guidelines envisaged another case where the prosecution can withhold material; that is when (v) the statement is to a greater or lesser extent "sensitive" and its disclosure is against the public interest. Such sensitivity applies, inter alia, to statements that deal with matters of national security, statements

25 Corker and Parkinson, above n. 17 at p. 7.
26 Attorney General's Guidelines 1981, para. 1.
27 Ibid. at para. 2.
28 Ibid. at para. 3.
29 Ibid. at para. 6. The working party had considered that "the discretionary power to withhold statements by "suspects" witnesses has been exercised by Counsel for as long as any of us can remember".
30 Corker and Parkinson, above n. 17 at p. 9.
31 Attorney General's Guidelines 1981, para. 6.

that disclose the identity of a member of the security services or statements that disclose the identity of an informant or a witness when there are reasons to believe that their disclosure would put them or their family in danger.[32]

"In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence".[33] The decision as to whether or not the balance in a particular case requires disclosure of sensitive material had to be made by the prosecution, although any doubt should be resolved in favour of disclosure.
By the beginning of the 1990s, the Court of Appeal made clear its disapproval of the way in which prosecutors exercised their wide discretion.[34] The dissatisfaction concerned the prosecutors' attitude of strictly observing the letter of the law rather than the spirit with which it was written.[35]

In R v Brown, the Appeal Court made clear that the guidelines were "merely a set of instructions to Crown Prosecution Service lawyers and prosecuting counsel."[36] The court remarked that the guidelines were out of date because they did not conform to the requirements of the law on disclosure as they had been drafted before major developments in the field occurred. The Court stressed the "useful purpose" that the guidelines had served but noted that "they had been eroded by other legal advancements, particularly the developments in the field of public interest immunity".[37]

The scheme set up by the guidelines was based on the idea that the discretion granted to the prosecution in the exercise of its responsibility was well placed due to the intrinsic fairness of its role. The guidelines did not contemplate judicial supervision or control of the way in which the prosecution carried out such delicate tasks. At the beginning of the 1990's several major miscarriages of justice caused by misconduct of the prosecution proved this construct of the law on disclosure to be fallacious.

5. The Case of Judith Ward

The case of Judith Ward[38] was one of a series of cases that, due to prosecutors' willful non-disclosure of relevant material to the defence, turned out to be among

32 Sensitivity characterises also statements which contain details that might facilitate the commission of other offences or alert someone not in custody that he was a suspect or statements that disclose some unusual form of surveillance or method of detecting crime; statements supplied only on condition that the content will not be disclosed at least until a subpoena has been served upon the supplier; statements related to other offences by, or serious allegations against, someone who is not an accused, or disclose previous convictions or other matters prejudicial to them; statements containing details of private delicacy to the maker and/or might create risk of domestic strife.
33 Attorney General's Guidelines 1981, para. 8.
34 See *R* v *Lawson*, (1990) Cr App R 107; *R* v *Phillipson*, (1990) 91 Cr App R 226; *R* v *Sansom*, [1991] 2 QB 130.
35 Corker and Parkinson, above n. 17 at p. 11.
36 *R* v *Brown*, (1995) 1 Cr App R 191, at 197.
37 Ibid. at 197.
38 *R* v *Ward*, (1993) 96 Cr App R 1, Judgment.

the gravest miscarriages of justice that had ever occurred in England.[39]
On 14 February 1974, Judith Ward was arrested in the course of the investigations that followed three different explosions, which had occurred in London, Manchester and Buckinghamshire between September 1973 and February 1974. One of these incidents was extremely severe leading to the death of 12 passengers, including two children, of a coach carrying English soldiers and their families.

During her detention, Ms. Ward was interviewed on several occasions by police officers. She was charged with 15 counts, including 12 counts of murder. She pleaded not guilty to all counts. The trial lasted four weeks at the end of which she was sentenced to a total of 30 years imprisonment. Miss Ward did not seek leave to appeal the sentence or the conviction.
On 17 September 1991, the Home Secretary referred the case of Judith Ward to the Court of Appeal. Section 17 (1) (a) of the Criminal Appeal Act 1968 regulates this procedure stating that:
Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Secretary of State may, if he thinks fit, at any time…(a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court by that person. The prosecution's case at trial in 1974 was based almost entirely upon confessions and admissions made by Ms. Ward to police officers and on expert evidence. During the appeal hearings, held in April, May and June 1992, allegations of non-disclosure of material evidence by the prosecution were heard. These allegations were the basis for the defence's argument that Ms. Ward's confessions were unsound and the expert evidence was not reliable.

The Home Secretary referred the case to the Court of Appeal making clear that the reason for the referral was the concern about the validity of expert evidence relied upon at trial. Specifically, doubts arose concerning the validity of the tests carried out by forensic scientists that had proved fallacious in the so-called "Birmingham six" appeal.[40] A test known as "the Griess Test" was used to detect traces of nitroglycerine on Ms. Ward's hand and belongings. Interestingly, in the case of the Maguire Family[41], whose conviction had been quashed by the Appeal Court, it had emerged that some other substances could lead to the same result as testing positive for nitroglycerine. This led to the inference that substances other than nitroglycerine could have provided the results of the tests carried out on Ms. Ward's hands, on her baggage and in her caravan.

Ms. Ward's defence raised three grounds of appeal.[42] First, it argued that a material irregularity had occurred before and during trial due to the prosecution's failure

39 The Court of Appeal between 1989 and 1991 had quashed the convictions of the "Guilford Four" in *R* v *Richardson and others*, The Times, 20 October 1989; the "Birmingham Six" in *R* v *McIlkenney,* (1991) 93 Cr App R 287 and the "Maguire Seven" in *R* v *Maguire & Ors,* (1992) 94 Cr App R 133. All these cases were related to the IRA bombings campaign that spread terror and death along the UK in the middle of 1970's. All of the accused during the mid-1970s had been tried and convicted on terrorist charges.

40 *R* v *McIlkenney,* (1991) 93 Cr App R 287.

41 *R* v *Maguire & Ors,* (1992) 94 Cr App R 133.

42 Following the reference of the case by the Home Secretary, the appellant is entitled to raise at his appeal any relevant issue.

to disclose relevant evidence that it was under a duty to disclose to the defence. Second, that fresh evidence was available which casted considerable doubt over the scientific evidence relied upon by the Crown during the trial. Third, that fresh evidence was available which proved that Ms. Ward suffered from a personality disorder so severe that none of her admissions could be considered true. For the purpose of this research, attention is devoted only to the first ground of appeal due to its major relevance to disclosure law.

The Appeal Court was satisfied that the prosecution's failure to disclose relevant evidence had constituted material irregularity in the course of the 1974 trial of Ms. Ward. The judges (for the purposes of the review of the case) considered the prosecution as an entity composed of the West Yorkshire Police, the staff of the Director of the Public Prosecutor (DPP), the psychiatrists who prepared medical reports on Ms. Ward, and the forensic scientists who gave evidence for the prosecution at trial.

The West Yorkshire Police had collected statements from over 1,700 people. Of this collection, only 225 statements had been forwarded to the DPP. "The principal relevance of the statements in question lies in their bearing on the appellant's proclivities for attention seeking, fantasy and the making and withdrawal of untrue confessions".[43] Among the statements, which were withheld by the police, some recorded the almost immediate retraction of the appellant's confession that she had been visiting the Thiepval Barracks on behalf of the IRA in order to reconnoiter it. This emphasises the importance of the role played by the investigators in the disclosure process. This responsibility remains a delicate and rather controversial topic in the modern law on disclosure. Failure to disclose relevant material to the defence was also detected in relation to the conduct of the DPP and the psychiatrists who prepared medical reports on Ms. Ward.

The bulk of the Appeal Court's judgment related to the way in which expert evidence had been gathered and revealed to the prosecution and judges by forensic experts. The expert evidence was based upon what the prosecution had asserted, that in 1974, Ms. Ward had been handling (at relevant times) nitroglycerine in relation to all three incidents. The forensic experts' conduct was harshly criticised by the judges.

The judges found that the forensic scientists had been biased and corroborated the prosecution's case by lying and suppressing evidence at the trial. It is useful to briefly describe their conduct to appreciate its gravity and its devastating effect on the outcome of the 1974 trial. The test for nitroglycerine conducted on Ms. Ward in relation to the Euston station explosion showed a "faint trace" on the right hand and "negative" for the left hand and for the nail scraping. Nevertheless, the experts described the results to the prosecution and the defence as "positive" for nitroglycerine. What had proved to be "faint trace" was portrayed to the defence as "positive". There was no disclosure to the prosecution, the court and the defence of

43 *R* v *Ward*, (1993) 96 Cr App R 1, Judgment.

the true results, which could have led the defence to contest the conclusion that nitroglycerine had been detected on Ms. Ward.

Furthermore, the forensic scientists had run several tests to determine whether it was possible that the debris caused by the explosion had contaminated Miss Ward. The results of the so called "firing cell tests" showed "faint", "very heavy" and "extremely heavy" traces of nitroglycerine on the hands of staff members who had touched objects in the firing cell. If these results had been disclosed at trial, they would have shown that there existed an alternative explanation for the traces of nitroglycerine detected on Ms. Ward. Only the most convenient test for the prosecution case was disclosed at trial and one of the experts explained to the Court that the result of such test had been "negative".

During the 1974 trial, the defence's forensic expert had argued that there existed substances, other than nitroglycerine, that the tests (carried out by the Crown experts) could confuse with nitroglycerine, but he was unable to name one. This clearly weakened his assertion. The Crown's forensic scientists had superior knowledge as in 1973 they had conducted several experiments on dyestuffs present in black shoe polish and had concluded that the dyestuff was very similar to nitroglycerine when tested with the TLC test they used. The prosecution was unaware of these results although their relevance for the ongoing trial was clear. On the contrary, one of the experts advised the prosecution that the test could not confuse any other commodity with nitroglycerine.

The Court of Appeal concluded that in the case of Ms. Ward "the disclosure of scientific evidence was woefully deficient. Three senior RARDE[44] scientists took the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial". The appeal was allowed on all counts and the conviction of Ms. Ward was quashed.

6. On the common law on disclosure

The case of Judith Ward marked a turning point in the regulation of the prosecution's obligation to disclose material to the accused in a criminal trial. The appeal judgment in this case, which was handed down in 1992, remedied one of the clearest miscarriages of justice that had occurred in the history of the English criminal system. The impact of this case on the following developments of the common law on disclosure in criminal cases was remarkable.

The appeal judgment of Judith Ward and the severe criticisms of the prosecution's non-disclosure occurred in that case was a watershed moment.[45] In this case, two main principles regarding the common law on disclosure were affirmed and they were profoundly different from the previous disclosure regime.
First, it was stated that in a criminal trial all relevant evidence that can help the

44 Royal Armament Research and Development Establishment.
45 Corker and Parkinson, above n. 17 at p. 14.

defendant must be either led by the prosecution or made available by him to the accused. "All relevant evidence of help to the accused is not limited to evidence which will obviously advance the accused case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution has gathered, and from which the prosecution have made their own selection of evidence to be led."[46] In other words, the previous disclosure regime was broadened to the extent that, except in cases where the court upholds an application for non-disclosure on public interest immunity grounds, everything else that has been gathered during a criminal investigations has to be disclosed.

Second, in Ward, the Court considered instances where the prosecution claims that certain material, relevant to the case, should be withheld and not disclosed to the defence because its disclosure would conflict with the public interest. This potential conflict can confer the so-called public interest immunity ("PII") on the material. Whether the public interest must prevail over the right of a defendant to disclosure was conceived as the outcome of a balancing of all the interests involved. With Ward, the prosecutions' discretion in carrying out such an assessment had proved defective. The Court intervened removing the balancing exercise from the hands of the prosecution and placing it in the hands of the judiciary. The rights of the defendant would be better guaranteed if it were the trial's judge and not a party to it to decide on the right balance to be struck.

The Court found that "when the prosecution acted as judge in their own case on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. These considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution is not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned."[47]

The Ward judgment reflected the distrust of the public opinion in the unlimited discretion granted to the prosecution, which had grown because of the major injustices discovered. The disclosure scheme was broadened as far as the subject matter of disclosure was concerned and was narrowed in relation to the disclosure exception whose assessment was removed from the prosecution and entrusted to the court. These changes on the law on disclosure modified the system moving it towards a more liberal approach to disclosure.

7. The "post Ward" jurisprudence

This section focuses on the judicial developments that followed the judgment delivered in the case of Judith Ward. In the years following the Ward case, the Court of Appeal delivered several judgments that framed and narrowed the contours of

46 *R* v *Ward*, (1993) 96 Cr App R 1.
47 Ibid. at p. 632-633.

the disclosure obligations drawn by the Ward judgment.

In R v Davis, Johnson and Rowe, the Court of Appeal stressed that the prosecution was not under a duty to notify the defence of the filing of a public interest immunity (PII) non-disclosure application to the judge in every circumstance.[48] The Court identified three different procedures. In the first procedure, to be adopted in the vast majority of cases, the prosecution gives notice to the defence of the PII application and describes at least the category to which the material whose non-disclosure is sought belongs. Consequently, the defence will be in a position to make submissions to the court. The second scenario refers to cases in which the prosecution cannot disclose to what category the relevant material belongs. In these cases, the prosecution notifies the defence that an application is being filed, but the category of the material is not mentioned and the application is ex parte. Finally, the third procedure, to be employed in exceptional circumstances, applies to cases where giving notice that a PII application is being made would equate to revealing the evidence in question. In this case, the prosecution can apply to the judge ex parte without notice to the defence.

The Court of Appeal acknowledged that an ex parte application affects the right of the accused to a fair trial but held that it would be against the public interest to compel the prosecution to choose between an inter partes procedure or the abandonment of the prosecution. According to the Court's reasoning, the control exercised by the trial judge over the views of the prosecution as to the proper balance to be struck represents a valid safeguard of the defendant's interests.

The new procedure of the ex parte applications was a novelty in criminal proceedings. The Court of Appeal seems to have conceded that the Ward regime had gone too far. The idea that information might reach the judge without any knowledge by the defence became a cause for concern among practitioners. On the other hand, this restrictive characterisation of Ward was better than the system in place before where the prosecution's discretion was not subject to judicial control.[49]

What had been underestimated in Ward was that by taking away the prosecution's discretion the judiciary would be flooded by applications from the Crown to withhold material and defence applications to inspect or have a copy of material they believed to be relevant to their case. The Courts were not comfortable with the new role they had been given in the aftermath of Ward.

In Ward the judges had used the term "material to the case" to characterise the evidence that needed to be disclosed to the defence. A narrow interpretation of this rather broad and undefined terminology was offered in Keane where it was held that the prosecution was under a duty to put before the judge only those documents that it considered to be material but wished to withhold on grounds of

48 *R* v *Davis, Johnson and Rowe,* (1993) 97 Cr App R 110.
49 Niblett, above n. 5 at p. 79.

public interest immunity.[50] Evidence that was "material to the case" was defined as evidence which could be seen "on a sensible appraisal" by the prosecution:

(1) to be relevant or possibly relevant to an issue in the case;
(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use;
(3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).[51]

This characterisation of evidence that is material to the case gave assistance to the prosecution in the exercise of his "sensible appraisal". The Ward regime was significantly revised by this new characterisation. Although the judicial scrutiny of what the prosecution intended to withhold remained in place, the discretion of the prosecution was restored in relation to a previous stage of the procedure. The "sensible appraisal of the prosecution" in deciding what evidence is "material" meant that the prosecutor decided what evidence the Court was and was not able to see.

8. The 1996 Criminal Procedure and Investigation Act

The discomfort with the Ward liberal law of disclosure was felt within both the judiciary and the executive power around the mid-1990s. The Court of Appeal was unhappy with the new workload it was facing and began encouraging the prosecution to deny disclosure and courts to be careful in examining defence applications for disclosure that could transpire to be totally unsound and groundless.

In R v Turner, the Court of Appeal noted that since the Ward judgment defence allegations of entrapment and duress followed by extensive disclosure applications had multiplied. It alerted "judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure."[52] In R v Bromley Magistrates ex p Smith, courts were invited to exercise some skepticism in treating defence challenges to prosecution's assertion that documents are not "material to the case".[53]

The political climate in the mid-1990s had also changed and the indignation caused by the miscarriages of justice of the early 1990s had allowed the opinion to develop that the balance had shifted too much in favour of criminals.[54] The burden of disclosure borne by the prosecution went beyond what was considered

50 *R* v *Keane*, [1994] 2 All ER 478.
51 Ibid. at 484.
52 *R* v *Turner*, (1995) 2 Cr App R 94.
53 *R* v *Bromley Magistrates ex p Smith,* [1995] 4 All ER 146 at 152.
54 Corker and Parkinson, above n. 17 at p. 17.

reasonable.[55] The system in place after Ward demanded too much of the prosecution and not enough of the defence. Many advocated legislative regulation of the law on disclosure.

Against this background the Criminal Prosecution and Investigation Act ("CPIA") was enacted and entered into force in April 1997. This new statutory provision revised the law on disclosure introducing a system based on three stages. Section 3 of the Act regulated primary disclosure and stated that the prosecution has a duty to disclose all undisclosed material that in its opinion "might undermine the case for the prosecution against the accused." Sections 5 and 6 stated that, after primary disclosure by the prosecution, the defence must give the prosecution and the court a statement in which it describes, in general terms, the nature of the accused's defence and highlights the matters on which the defence takes issue with the prosecution. In the third stage, under section 7 of the Act, the prosecution makes a secondary disclosure of all previously undisclosed material, which, in light of the defence's statement, "might be reasonably expected to assist the accused's defence".

The Act introduced a double test in relation to primary and secondary disclosure by the prosecution. The test for primary disclosure was a subjective test relying on the prosecution's opinion of what it believed could "undermine the case for the prosecution against the accused". The Act also introduced for the first time, an obligation on the defence to disclose the nature of its case on cases tried on indictment. Only the defence's disclosure triggers the secondary disclosure by the prosecution. Prosecution material was defined in section 3 as material that the prosecutor possesses or has inspected in connection with the case against the accused.

The defence's failure or delay in giving a defence statement can lead the judge and the jury to draw negative inferences in deciding whether the accused is guilty. Such inferences cannot lead solely to the conviction of the accused.

One of the major criticisms of the scheme introduced by the Act targeted the double disclosure test applicable to primary and secondary disclosure. In 2001, a comprehensive review of the criminal justice system commissioned by the government to Sir Robin Auld, a senior judge of the Court of Appeal, was published.[56] The review noted, inter alia, that the differently formulated tests for disclosure tended to suggest a narrow subjective approach at the primary stage and a broader and objective one at secondary stage creating confusion and pre-trial delays and disputes.[57] It concluded that the system caused the "frequent failure to exchange adequate disclosure at an early stage to enable both parties to prepare for trial efficiently and in a timely way."[58]

55 *Report of the Royal Commission On Criminal Justice*, para 49. It went on underlying how "The defence can require the police and the prosecution to comb through large masses of material in the hope either of causing delay or of chancing upon something that will induce the prosecution to drop the case rather than to disclose the material concerned. The defence may do this by successive requests for information, far beyond the stage at which it could be reasonably claimed that the information was likely to cast doubt on the prosecution case."

56 *The Review of the Criminal Courts in England and Wales* ("the Auld Report"), 2001.

57 Ibid. at para 162.

58 Ibid. at para 167.

There were also criticisms of the introduction of the defence's duty to give to the court and the prosecution a defence statement, which was rather revolutionary in an adversarial criminal law system. Defence disclosure had previously not been contemplated. Defence lawyers contrasted this reform, arguing that it led to an inversion of the burden of proof and constituted a duty to help the better-resourced prosecution.[59] The defence was requested to put forward the nature of its case "in general terms". However, such an obligation had the effect of tying the defendant to the specific defence put forward without having full knowledge of the prosecution's material. In fact, only after the defence statement had been given to the prosecution was the latter under a duty to proceed with secondary disclosure. In other words, the accused had to construct his defence on the basis of the material given to him after primary disclosure and to stick to it even after secondary disclosure had occurred. The judge and the jury could draw inferences from any discrepancies between what was in the statement and the case being presented by the defence at the trial. The court should hear the defence's possible explanations for the discrepancy.

Defence lawyers approached the new disclosure duties with skepticism and managed to formulate rather vague statements leaving alternative defences open at trial.[60] Nonetheless, such an approach frustrated the prosecution and potentially led to very limited secondary disclosure. The way it was applied in practice defeated the purpose of the 1996 CPIA.

The studies conducted on the implementation of the 1996 CPIA revealed a "widespread dislike of the legislation" by defence practitioners and a "manifested unwillingness of the defence to submit meaningful defence statements and judicial reluctance to deny defence applications to see unused material".[61] Consequently, the functioning of the entire disclosure scheme was frustrated by this conduct.

9. The Criminal Justice Act 2003 and the current system of disclosure

9.1 Introduction

The drafters of the Criminal Justice Act 2003 ("CJA") intended it to be an endorsement of the Auld Report's recommendation to create a single and simply expressed instrument regulating disclosure rather than the confusing combination of different legislations.[62] However, the CJA did not abolish the 1996 Criminal Prosecution and Investigation Act but amended it. This choice proved to be unfortunate as it encouraged the proliferation of different provisions from different sources.

59 Taylor R., Wasik M. and Leng R., *Blackstone's Guide to the Criminal Justice Act 2003*, Oxford University Press, 2004, pp. 39-40.

60 Plotnikoff J. and Woolfson R., *"A fair Balance?" Evaluation of the Operation of the Disclosure Law*, RDS Occasional Paper No 76, 2001, p. 136. Their study showed that "defence cynicism about the CPIA was reflected in the failure of defence statements to address the issues set out in the legislation... In the Crown Court, judicial reluctance to resist late service or defence disclosure requests has done little to encourage timely or meaningful defence statements. None of the judges who commented on defence statements found them useful in their current form."

61 Ibid. at para 145.

62 Sir Auld stated that "the present combination of the cumbrously drafted 1996 Act and Rules, the Code, the Attorney General's Guidelines and the Joint Operational Police Instructions is confusing and hard work for anyone to master, not least busy policemen and prosecutors".

The absence of one consolidated text on disclosure is indeed a characteristic of the English/Welsh law on disclosure. The plurality and combination of protocols, manuals, guidelines and statutory law on disclosure generates confusion rather than clarity.
To give an idea of the current system it is sufficient to state that the operation of the CPIA, as amended by the Criminal Justice Act, is guided by several tools among which are the Criminal Procedure Rules (2014) and the Code of practice which was issued in part 2 of the CPIA.[63]

Furthermore, the judiciary issued a disclosure protocol for the Crown and the Magistrate's Courts (2006)[64] as well as a judicial protocol on the disclosure of unused material in criminal cases (2013).[65] The Attorney General issued guidelines in 2000 in order to assist the operation of the statutory regime on disclosure. In April 2005, the Attorney General issued new guidelines on the disclosure of unused material in criminal justice proceedings. In July 2011, the Supplementary Attorney General's Guidelines on Disclosure, Digitally Stored Material were issued. In December 2013 new Attorney General's Guidelines on Disclosure were issued and replaced the previous ones.
In addition, in 2005 a disclosure manual for the police and the Crown Prosecution Service (hereafter CPS or Prosecution Service) was created.[66] Finally, operational instructions for investigators and prosecutors can be found in the disclosure manual issued by the Association of Chief police officers and the CPS.
This subsection analyses the main provisions of the 2003 Criminal Justice Act and their impact on the law on disclosure. Specifically, attention is paid to the changes that the new statutory law introduced in relation to the investigation stage, the prosecution disclosure and the defence disclosure.

9.2 The investigation stage

In England and Wales, the Crown Prosecution Service is responsible for the prosecution of persons charged with a criminal offence. The CPS is an independent body established in 1986 to prosecute criminal cases. It is a non-ministerial department of the Government of the United Kingdom. It is independent from the police although it works closely with them at all times. The director of the public prosecutor heads the CPS and the Attorney General for England and Wales, who is answerable for it in Parliament, supervises its operation.

63 The Criminal Procedure Rules regulate the way a criminal case is managed. They apply in all magistrates' courts, the Crown Court and the Court of Appeal. The latest edition entered into force on 6 October 2014. The Code of Practice, as recorded in its Preamble, sets out "the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters".

64 The protocol's title is: *Disclosure: A Protocol For The Control And Management Of Unused Material In the Crown Court* (the Disclosure Protocol). It was issued by the Courts service in February 2006.

65 As stated in its foreword, the Protocol (which is applicable to all criminal Courts in England and Wales) was prepared following the recommendations of Lord Justice Gross in his September 2011 'Review of Disclosure in Criminal Proceedings'. It also takes account of Lord Justice Gross and Lord Justice Treacy's 'Further review of disclosure in criminal proceedings: sanctions for disclosure failure', published in November 2012.

66 The combined efforts of the CPS and the association of Chief Police Officers gave birth to the *Disclosure Manual* that provided operational instructions in the implementation of disclosure principles and procedures. The Manual reflected the Prosecution approach to disclosure obligations and was the authoritative guidance on practice and procedure for all police investigations and CPS prosecutors.

Another important function of the CPS is to advise the police during investigations on a possible prosecution; for instance by clarifying the elements of a specific crime. Moreover, the CPS prepares cases for court, prosecutes them before the Magistrate Courts and instructs barristers to prosecute cases before the Crown Courts and higher jurisdictions.
The Criminal Justice Act intervened on the charging process that up until 2005 was the responsibility of the police. It was, in fact, up to the police to decide whether to charge a suspect. The Crown Prosecution Service would then receive the case and assess whether there is sufficient evidence and whether is in the public interest to prosecute.[67]
Currently, the police power to charge a suspect is limited to less serious offences and it is the CPS who charges the suspects and subsequently decides whether or not to prosecute.
The Code for the Crown Prosecutor dictates the procedure to be followed, in order to assess whether or not to prosecute.[68] The Prosecutor must ask himself whether there is enough evidence for a realistic prospect of conviction and whether it is in the public interest to prosecute. Such questions must be answered in this order. Therefore, in the absence of sufficient evidence there will be no room for public interest considerations.

There is therefore a tripartite structure to the English prosecution service, which involves the police, the prosecutor and barristers. An essential aspect of the law on disclosure in the English/Welsh legal system is the process of providing the prosecution with the material gathered in a criminal investigation by the police. This is a very delicate juncture of the disclosure procedure. A mistake made at this stage may potentially compromise the effectiveness of the disclosure process and the fairness of the whole trial.

The prosecution's duty to disclose continues throughout the trial which implies that the prosecution has to assess what material must be disclosed to the defence at any given moment. Such a delicate task can only be carried out if the prosecution is fully aware, from the outset of a case, of the existence of material that should potentially be disclosed. It is therefore essential that police officers fulfil their obligations to retain, record and schedule all the material with a large degree of attention and competence.
In relation to this, it is noted that the 2013 Attorney General's guidelines emphasise that "whatever the approach taken by investigators or disclosure officers to examining the material gathered or generated in the course of an investigation, it is crucial that disclosure officers record their reasons for a particular approach in writing".[69] They also stress that "disclosure officers must seek the advice and assistance of prosecutors when in doubt as to their responsibility as early as possible".[70]

67 Heinze, above n. 3 at p. 259.
68 The Code for Crown Prosecutors is a key document for the CPS. It provides guidance to prosecutors on the general principles they should apply when making decisions about prosecutions. See http://www.cps.gov.uk/
69 Attorney General's Guidelines 2013 para. 22.
70 Attorney General's Guidelines 2013 para. 27.

Scheduling is particularly important in the English/Welsh criminal procedure in light of the fact that different and independent players such as investigators, prosecutors and counsel compose the prosecuting apparatus. The schedule is a formal link between the investigator's role and that of the prosecutor.[71]

The primary source that regulates the process is the CPIA Code of Practice ("Code") issued under section 23 of the Criminal Procedure and Investigation Act as amended by the Criminal Justice Act.[72]
The Code divides police officers and others involved in a criminal investigation into three categories; the investigator, the officer of the case and the disclosure officer.
The investigator is "any police officer involved in the conduct of a criminal investigation".[73] The investigator records and retains the relevant material gathered during a criminal investigation. The latter must be conducted by the investigator pursuing "all reasonable lines of inquiry, whether this points towards or away from the suspect".[74] This task requires the exercise of considerable professional expertise.
The officer in the case is the second role delineated by the Code. This officer's duty is to ensure that proper procedures are followed in recording information and retaining records of information and other material.
Finally, the disclosure officer is in charge of the examination of the material retained by the police. He has to schedule and reveal the material to the prosecution during the investigation and any criminal procedure resulting from it and disclose material to the defence when the prosecution so chooses. The disclosure officer's misconduct can have serious consequences on the fairness of the disclosure process and on the overall fairness of the trial.

What kind of material is "relevant to an investigation"[75] and therefore has to be retained and recorded? The Code defines relevant material as all the material that has "some bearing on any offence or investigation or any person being investigated"[76] or on other aspects of the case. What is not relevant is the material that has no impact on the case. This very overarching definition omits very little material.

The process that leads to the disclosing of the material to the prosecution is characterized by different moments. The material relevant to the investigation has to be recorded in a durable and retrievable form and retained by the investigator and the officer of the case. Interestingly, the Code requests recording and retaining of the relevant material but not its inspection, at least not in this phase.
In addition, all the relevant material, which the disclosure officer believes will not form part of the prosecution's case, must be inspected and scheduled.[77] Here the

71 See the Review of Disclosure in Criminal Proceedings, Lord Justice Gross, September 2011, para. 120.
72 Other relevant legal sources are the 2006 Disclosure Manual, the Attorney General's Guidelines on Disclosure issued in April 2005, the protocol issued by the Court Service, "Disclosure: A Protocol For The Control and Management of Unused Material in The Crown Court (the Disclosure protocol) in February 2006 and the judicial protocol "Control and Management of Heavy Fraud and Other Complex Criminal Cases"(the Fraud protocol) issued in March 2005.
73 The CPIA Code of Practice issued under section 23 of the CPIA, para. 2.1.
74 Ibid. at para 3.5.
75 Ibid. at para. 2.1.
76 Ibid. at para. 2.1.
77 There are two exceptions to the duty to schedule the material retained. The first applies to cases in which "super sensitive" material has been gathered. In these cases, the disclosure officer does not have to schedule and describe in writing the items retained, but may reveal them to the prosecution in other ways. The second exception refers to cases in which a large bulk of material has been gathered. Such material will be revealed to the prosecution in electronic form.

definition of unused material makes its appearance in the disclosure scheme. The scheduling procedure is intended to allow the prosecution to rely on the schedule, when undertaking the disclosure test, with no duty to examine or inspect any of the unused material. Therefore, the description of the material should be accurate and detailed.
According to the Code, the unused material must be divided into schedules. For this purpose, unused material is divided into sensitive and non-sensitive material, which are scheduled separately. The former is the material whose disclosure, in the opinion of the disclosure officer, would "give rise to a real risk of serious prejudice to an important public interest".[78] This important characterisation of the material as sensitive or non-sensitive is a subjective decision made by the disclosure officer.

Once all the unused material gathered during an investigation has been inspected and scheduled, the disclosure officer is required to write and submit to the prosecution a report describing the activity he has carried out. The report is intended to draw the prosecution's attention to material that, in the disclosure officer's opinion, may be disclosed to the defence. Furthermore, the disclosure officer must sign a personal undertaking certifying that to the best of his knowledge all relevant material that has been gathered and retained has been revealed to the prosecution in accordance with the Code of practice.[79] This requirement stresses the relevance and delicacy of the duty to the disclosure officer. The prosecution will rely on his work when making the decision as to whether to disclose the items listed in the schedule to the defence.

The statutory law entrusts the police with the crucial responsibility of compiling the schedules. The police are required to play an inquisitorial role in an adversarial context. The police are expected to pursue any reasonable lines of inquiry as to whether these point toward or away the guilt of the suspect. Nonetheless, the police are still perceived by themselves and the public opinion as acting on behalf of the prosecution.[80]
Critics of this system argued that there is no historical justification, in the English legal system, to invest the police and the prosecution with this degree of trust but have also acknowledged that it is difficult if not unrealistic to find an alternative.[81]

Before the advent of the 2003 CJA, different recommendations had been made on possible improvements in the system. Plotnikoff and Woolfson argued in their study against the removal of responsibility from the police for the decision on disclosure. They held that the "ability to identify what undermines the evidence against an accused is a crucial investigative skill".[82] They suggested an improvement of the checks and balances to ensure that police disclosure decisions are fully and thoroughly reviewed.

78 The CPIA Code of Practice issued under section 23 of the CPIA, para. 6.12.
79 Ibid. at para 9.1. See also the Disclosure Manual, chapter 10, paras. 16-17.
80 Quirk H., *The significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work*, (2006) 10 International Journal of Evidence & Proof, 42-59, p. 48.
81 Leng R., *Disclosure: A Flawed Procedure,* a paper given at a Justice Seminar on 12th June 2000 for the Criminal Courts Review.
82 Plotnikoff and Woolfson, above n. 60 at p. 19.

Sir Robin Auld took a different view. He believed that better training of police officers would suffice to continue relying on them to gather, record and schedule relevant material but he advised a shift, from the police to the prosecution, of the responsibility to decide upon initial, as well as ultimate, disclosure.[83] The prosecution should act in the procedure as early as possible to relieve the police from their initial responsibility of deciding what has to be disclosed. This task requires a skilled assessment of the relevance of certain material to issues that lie at the core of a criminal trial and therefore it should be performed by prosecution lawyers.

The Criminal Procedure and Investigation Act, as amended by the Criminal Justice Act and its Code of Practice did not entirely follow either of the above recommendations. Under the present system, the police retain not only the duty to schedule all the relevant material gathered during the investigation but also the delicate responsibility of making initial decisions on what material is sensitive or not and therefore which material will be disclosed to the defence. However, the prosecution must control and assist the police in this process.[84] In cases that are more important the prosecution and the police are required to cooperate from the onset of the investigation.[85] The prosecution is characterised as a superintendent and its role assumes great importance if seen from the defence's perspective. The latter will have no opportunity to see the sensitive schedule and therefore the prosecution is the only authority able to scrutinise the police assessment.

Studies conducted on the implementation of the disclosure officers' duties to compile the schedules have shown the prosecution's dissatisfaction with and concern regarding the way in which this important activity is carried out.[86] Most of the schedules listing non-sensitive material described material so poorly that it was impossible for the prosecution to assess the nature of the material.[87]

9.3 The prosecutor's duties to disclose

The CJA ended the double prosecution disclosure and introduced one single test applicable by the prosecution in assessing what must be disclosed to the defence. The secondary disclosure triggered by the defence statement was removed. The new test requires the prosecution to disclose all the material that "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".[88]

Although secondary disclosure has been abolished under the Criminal Justice Act, a narrow interpretation of the new test can lead to the same situation envisaged

83 "The Review of the Criminal Courts in England and Wales" ("the Auld Report"), 2001, para. 176.
84 See *Disclosure: A Protocol For The Control And Management Of Unused Material In the Crown Court*, above n. 64 at para 17.
85 See *Disclosure Manual*, at chapter 29.
86 Quirk, above n.80 at p. 52.
87 Plotnikoff and Woolfson, above n. 60 at para 29.
88 Criminal Justice Act 2003, section 3(1)(a).

by the former 1996 Criminal Procedure and Investigation Act. If the expression "the case for the accused" is interpreted as meaning the specific line of argument that the defence will take at trial then it will be impossible for the prosecution to know that until the defence statement has been received. This interpretation would leave the procedure unchanged despite the spirit of reform that inspired the CJA and it is therefore to be discarded. A better approach is to consider "the case for the accused" as meaning every possible defence that is reasonable to consider as available to the accused in the relevant case.[89]

The new test envisaged by the Criminal Justice Act, unlike the former one, is an objective test that the prosecution applies to detect which material it must disclose to the defence. The test does not rely on the prosecution's opinion but gives him guidelines to objectively identify the material he needs to disclose.

As far as the initial disclosure is concerned, prosecution material is defined as material that is in the prosecution's possession and came into its possession or has been inspected by it in connection with the case for the prosecution against the accused. Therefore, material assessed by the disclosure officer that has not been sent to the prosecution does not qualify as prosecution material.[90]

The secondary prosecution disclosure stage is replaced by the continuing duty to disclose. The prosecution has to monitor the state of the proceedings and its development in order to check whether there is material in its possession that must be disclosed as the trial unfolds. The CJA does not require the prosecution to inspect the material in its possession during the trial to check whether it meets the test for disclosure, but states that the prosecution has to review the material. This subtle difference implies that the prosecution can keep on relying on the schedule prepared by the disclosure officers and the description of the material given therein, without any critical analysis.[91]

Although the prosecution's second disclosure stage was removed from the procedure, the prosecution still faces similar duties once the defence has given the statement underlying the nature of the accused's defence.[92] If, in the light of the defence statement, the prosecution identifies more material in its possession capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, it would have to disclose it. The logic is therefore similar to that which was behind the previous secondary disclosure.

The CJA regulates the possibility for the accused to make an application to the court for disclosure at any time when he has reasonable cause to believe that there is prosecution material that should have been disclosed to him and was not.[93] This

89 Taylor, Wasik and Leng, above n. 59 at p. 37.
90 Corker and Parkinson, above n. 17 at p. 89.
91 Taylor, Wasik and Leng, above n. 59 at p. 38.
92 Criminal Justice Act 2003, section 7A(5).
93 CPIA 1996 s. 8. The procedure for making such applications is regulated in the Criminal Procedure Rules 2014.

possibility is granted only if a defence statement has been provided.[94] In relation to this procedure, it is notable that an expanded definition of prosecution material applies as it includes material that the prosecution has not seen because it has been retained by the investigators. Therefore, prosecution material for the purpose of a defence application for disclosure is not limited to material in possession of the prosecution but includes also material which is still in possession of the police.

It is unfortunate that the government did not intervene to reform the existing procedure as drafted in the CPIA, given that the accused will have to rely on the accuracy and completeness of the descriptions of non-sensitive material offered by the disclosure officers in their schedule in order to make an effective application for further disclosure. Specific research had demonstrated that these functions, which are essential for the correct functioning of the disclosure procedure, were poorly performed.[95]

The Criminal Justice Act, as the Criminal Procedure and Investigation Act, does not lay down strict timing for initial disclosure by the prosecution, which has to be done "as soon as reasonably practicable" after the accused pleads not guilty or is committed for trial.[96]

9.4 The defence's duties to disclose

The first statutory defence obligation to disclose was articulated in the 1987 Criminal Justice Act. It applied to a very limited number of cases, regarding serious fraud. Before 1987 there was no statutory or other provision regulating defence pre-trial disclosure. In the adversarial tradition, the right of the accused to keep his defence secret until the commencement of the trial was strictly linked to the right to remain silent and the prosecution's burden of proof. By 1997 defence disclosure had however been extended to criminal proceedings.

As previously mentioned, the CPIA introduced a defence disclosure obligation in criminal trials. Accordingly, the defence, following the prosecution's primary disclosure, ought to give to the prosecution and the judge a statement setting out, in general terms, the nature of its defence, the matters on which it takes issue with the prosecution and the reasons why it does so.[97]

In his review, Lord Justice Auld stated that defence disclosure should be guided by the principle that "a defendant's right of silence is not a right to conceal in advance of trial the issues he is going to take. Its purpose is to protect the innocent from wrongly incriminating themselves, not to enable the guilty, by fouling up the criminal process, to make it as difficult as possible for the prosecution to prove their guilt, regardless of cost and disruption to others involved".[98]

94 Corker and Parkinson, above n. 17 at p. 78.
95 Quirk, above n. 80 and Plotnikoff and Woolfson, above n. 60.
96 Criminal Justice Act 2003, section 13(1).
97 The 1996 CPIA, chapter 25, article 5(6), *Compulsory Disclosure by the Accused.*
98 *The Review of the Criminal Courts in England and Wales* ("the Auld Report"), 2001, para 183.

In assessing the functioning of the disclosure regime put in place after 1997 it emerged that the majority of the defence statements did not comply with the requirements set out in the Criminal Procedure and Investigation Act. Defence counsels opposed the new duty to disclose their case before trial and circumvented it through the redaction of very vague statements. These were mostly a broad negation of all charges and contained extended requests addressed to the prosecution to disclose material with no explanation of the relevance of that material to their case.
The debates that anticipated the adoption of the CJA 2003 were characterised by frequent reference to the importance of pre-trial defence disclosure and the need to rebalance the criminal justice system in favour of the victim.[99] Mandatory broader disclosure was agreed to be the route to follow.

The 2003 CJA regulates the content of the defence statement adding further requirements. Specifically, section 6A still requires the defence to set out the nature of its case, but the expression "in general terms" has been removed from the text as it was considered too vague and prone to being narrowly interpreted by the defence's counsel. The statement must also indicate any specific defence the accused intends to rely upon at trial. This change suggests that the court expects a more detailed description of the defence's case.

Furthermore, the defence statement must set out any particular matters of fact on which the defendant intends to rely for the purposes of his case. It also has to indicate any point of law (including any point as to the admissibility of evidence) which the defence wishes to take, and any jurisprudence it intends to rely on for that purpose.

Unlike under the CPIA, the defence statement cannot limit its content to issues of fact but it will have to disclose points of law that will be at the core of the defence's case. This strict requirement places a considerable burden on the defence. What seems to be unreasonable is that the prosecution will benefit from this preliminary detailed disclosure of the defense's arguments, whereas the defence could still be taken by surprise at trial, as there is no corresponding obligation on the prosecution. Should this happen, the defence could have a fair trial only if the court granted adjournments to permit the analysis of the new arguments put forward by the prosecution. On the other hand, this approach would conflict with the goal of efficient judicial administration.[100]

Disclosure obligations were also envisaged in cases where the accused intends to rely on an alibi. Evidence that corroborates an alibi is defined as evidence showing that, by reason of the presence of the accused at a particular place or in a particular area at a particular time, he was not or was unlikely to have been at the place where the offence is alleged to have been committed at the time of its alleged commission. The CJA slightly broadened the defence's obligation in relation to details of

99 Corker and Parkinson, above n. 17 at p. 110-111.
100 Taylor, Wasik and Leng, above n. 59 at pp. 41-42.

proposed alibi witnesses. Besides the name and address of the witness, the defence statement must indicate the date of birth and all details that might help to identify such witnesses.

One of the most harshly criticised changes implemented by the Criminal Justice Act was the extension of the disclosure obligation pertaining to alibi witnesses to all defence witnesses. Section 6C requires the accused to give notice to the court and the prosecution of the witnesses he intends to call and to disclose their details. If at a later stage, the accused decides not to call a witness or to call an additional one or any other change to the previous notice, the defendant must give amended notice to the court and the prosecution. The defence has no obligation to disclose the content of each proposed witness testimony but only details related to their identification.

Two concerns follow these provisions. First, it is a one-side obligation, which is not reflected on the prosecution. The second concern relates to the possibility that police and investigators might interview defence witnesses after their identities have been revealed. During parliamentary debates over the CJA, a Home Office Minister explained that the justification for this new obligation was, inter alia, to allow the police to make criminal record checks on defence witnesses to help the jury to assess their credibility and to enable the police to interview defence witnesses before the trial, and if necessary to make further enquiries.[101]

Scholars submitted that such an understanding of the defence disclosure in relation to defence witnesses might conflict with the European Convention on Human Rights.[102] Article 6.3 states that everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. It seems indeed questionable that the defence has to disclose details of his witnesses (and allow the police to interview them) whereas no such obligation is placed on the prosecution and the defence might not be entitled to seek contact with prosecution witnesses. Indeed, the prosecution, in serious cases, may apply to the court for an order that forbids the accused from seeking direct or indirect contact with certain prosecution witnesses.
In relation to expert witnesses, the CJA requires the defence to give notice to the prosecution and the court of the name and address of every expert it instructs to provide an expert opinion that might be used at trial. The aim of this provision was to deter the defence practice of "expert shopping" that consists of instructing several experts to provide opinions until one is found that can corroborate its case. Second, unused reports might be potentially used as evidence by the prosecution. Initially, the government planned a more stringent obligation that included disclosure of unused expert reports. However, such an obligation would have proved ineffective,

101 Standing Committee B, column 247, 9 January 2003, quoted in David Corker and Stephen Parkinson, *Disclosure in Criminal Proceedings*, Oxford University Press, 2009, p. 119.
102 Corker and Parkinson, above n. 17 at p. 121

as the expert report would be covered by litigation privilege.[103] The same line of argument applies to the possibility that the prosecution, once defence discloses the details of an expert they plan to use, calls him as a witness.

An example might help to understand the point. In R v Davies the defence had instructed a psychiatrist to examine the accused. The expert did not confirm the defence's argument of diminished responsibility. Nonetheless, the expert could not testify for the prosecution because what the accused had told her was privileged.[104] On the other hand, disclosure of a defence expert's details might benefit the prosecution in other ways such as by pointing to a different methodology or technology of analysis (on which the expert relied) which was unknown to the prosecution before. This possibility, although rare, raises questions about this new disclosure obligation, which might be perceived of as unfair.[105]

The CJA responded to the criticism that defence disclosure under the CPIA was a "once and for all" event that took place 14 days after prosecution disclosure and ended at that very moment. It introduced a duty on the defence to provide a further updated defence statement or a statement indicating that no change will be made by the accused to his previous defence statement.[106]
Moreover, the Criminal Justice Act envisaged the possibility that in criminal proceedings involving more than one accused, the defence statement made by one defendant is disclosed to the other co-accused.[107] The Act provides that the courts, at the request of any party or motu proprio, can order such disclosure.

Finally, the CJA introduced amendments aimed at strengthening the possibility of enforcing the defence's disclosure. Judges and the prosecution, under the Criminal Procedure and Investigation Act regime, had shown uneasiness in inviting juries to draw negative inferences from the defence's failure to disclose. The possibility of drawing adverse inferences arises when the defence fails to provide a defence statement or it provided it late, when the statement contains inconsistent defences or when the defence at trial goes beyond the statement. Inconsistencies between the statement and the trial may arise when the accused has put forward a defence during the trial, which was not outlined in the previous statement, when he calls witnesses or alibi witnesses not indicated in the statement or when the accused provides an alibi for the first time. In other words, negative inferences can be drawn when the conduct of the defendant at trial is not coherent with the defence statement given before unless a justification for that exists and is accepted by the court. The CJA provides that adverse inferences no longer require the leave of the court to be drawn by the jury. The prosecution or a co-defendant can simply underline the failure. However, where the defence has not disclosed a point of law

103 Litigation privilege arises when litigation is in contemplation. It prevents the disclosure of documents that come to existence at the request of a lawyer or client in relation to that specific litigation. In the UK when experts are retained to assist counsel to prepare for trial the communications between the expert and the lawyer are confidential and subject to litigation privilege. All solicitor communications (bar material instructions) with the expert are covered by litigation privilege.
104 *R* v *Davies,* [2002] EWCA Crim. 85.
105 Redmayne M., *Criminal Justice Act 2003: Disclosure and Its Discontents*, Criminal Law Review, 2004.
106 CJA 2003, Section 6B.
107 CJA 2003, Sections 5A – 5D.

that was then relied upon in the trial or did not provide details of a witness the leave of the court (to the jury in order to draw negative inference) is still needed.

9.5 The 2011 Review of Disclosure in Criminal Proceedings and the 2013 Judicial Protocol on the Disclosure of Unused Material in Criminal Cases

In 2011, a review of the disclosure in criminal cases was carried out at the request of the Lord Chief Justice, prompted by concerns as to the operation of the disclosure regime contained in the CPIA as amended by the CJA. The review was not concerned with disclosure of security and intelligence material, which calls into play the concept of public interest immunity. For this reason, the review's recommendations are analysed in this subsection before moving to the conflict between confidential material and disclosure in the following section.

While the review did not advocate changes to the existing provisions, it made several recommendations for improving the way in which the parties involved conducted the existing disclosure process. It referred to several failures on the part of the prosecution in the disclosure process, which led to the collapse of several high profile criminal cases, as contributing to the persistent lack of confidence in the prosecution's performance of its disclosure obligations.[108]

The review supported the existing tripartite structure of the English prosecution (investigators, prosecutors and counsel). However, it remarked that it contributes "to a lack of ownership in the prosecution case, lower motivation and the inability of the prosecutor to exercise appropriate direction and control over the investigation".[109] This would be particularly problematic considering that important decisions as to the scope of disclosure may have to be made at a very early stage where the prosecutor may not yet be involved in the case.

In relation to this point, the review recommended an early, sensible and sustained cooperation between prosecutors and investigators, together where appropriate, with the early involvement of trial counsel, with respect to disclosure matters.[110] Moreover, it stressed the importance of accurate training for police investigators, who play a fundamental role in the disclosure process as it is conceived in the CPIA.[111] Provided that the prosecution's disclosure is carried out correctly, the review considers it "unacceptable for the defence to refuse to engage in the early identification of the real issues in a case".[112]

Furthermore, the review envisaged a "robust management of disclosure matters" by the judiciary as an essential contribution to the improvement of the disclosure process. Specifically, judges should be prepared to give early guidance or indications

108 Review of Disclosure in Criminal Proceedings, Lord Justice Gross, September 2011, para. 64.
109 Ibid. at para. 63.
110 Ibid. at Annex D, para. 7.
111 Ibid. at Annex D, para. 8.
112 Ibid. at Annex D, para. 11.

as to the prosecution's approach to disclosure as well as excluding untimely disclosed material from the trial.[113]

Finally, the review acknowledged that the consolidation into one single text of all the disclosure provisions would assist in the effectiveness of the system. However, it noticed that due to the different nature and origin of such legal instruments such a goal would be unrealistic.[114]
As mentioned above, following this review a new judicial protocol for the disclosure of unused material in criminal cases was issued in December 2013 (hereafter the protocol).[115]

The protocol emphasised that the meaning of disclosure switched from being "a matter to be resolved between the parties" with the court only coming into play "if a particular issue or complaint was raised" to being a matter that "gives judges the power – indeed, it imposes a duty on the judiciary – actively to manage disclosure in every case".[116]

The protocol took on board several of the 2011 review recommendations. It stressed the important role the judges have in monitoring the timetable for prosecution and defence disclosure as well as in asking the parties to "identify the issues of the case" inviting them "to indicate whether further disclosure is sought, and on what topics".[117] Furthermore, should problems arise in the disclosure process judges, in "exercising appropriate oversight of disclosure" should address the issues and give instructions.[118]

The protocol reaffirms the prosecution's obligation to review the unused material in its possession applying the relvant test for disclosure. It stipulates that judges should not allow the prosecutor to bypass such obligation by "the expedient of permitting the defence to have access to (or providing the defence with copies of) the material listed in the schedules of non-sensitive unused prosecution material irrespective of whether it satisfies, wholly or in part, the relevant test for disclosure".[119]

Finally, in relation to the defence's engagement in the disclosure process the protocol states that in order to prepare a "properly completed defence statement" the defence should have access to "the case papers and consider initial disclosure".[120] It emphasises the importance of the defence statement for the effectiveness of the

113 Ibid. at Annex D, paras. 13-14. On the issue of managerial judging, see also the Criminal Procedure Rules 2014, which envisage that the court must actively manage the case. This includes, *inter alia*, achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case and ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way.
114 Ibid. at Annex D, para. 18.
115 As stated in its introduction "this judicial protocol sets out the principles to be applied to, and the importance of, disclosure; the expectations of the court and its role in disclosure, in particular in relation to case management; and the consequences if there is a failure by the prosecution or defence to comply with their obligations."
116 Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, 2013, para. 56.
117 Ibid. at para. 7.
118 Ibid. at para. 16.
119 Ibid. at para. 13.
120 Ibid. at para. 10.

disclosure process and states that it must be served "within 28 days of the date when the prosecution complies with its duty of initial disclosure".[121] The protocol makes it clear that the defence's failure to serve its statement within a given deadline may lead the court to draw an adverse inference at trial.[122] Moreover, it underlies that the defence application for diclosure should not be heard when a defence statement has not been submitted.[123]

10. The development of the Public Interest Immunity doctrine

The balance between two conflicting interests is never simple to handle and it is even more problematic when the right of an accused to a fair trial is involved. In criminal proceedings, the right to an adversarial trial means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[124] However, although all material evidence for or against the accused must be disclosed, the right to disclosure is not an absolute right. The Public Interest Immunity (PII) doctrine enables the prosecution to withhold relevant information when the court determines that its disclosure would prejudice the public interest. PII is a principle of English common law that gave rise to significant litigation on disclosure matters and led to the adoption of provisions regulating the test that must be carried out in order to assess the interests at stake. As such, the analysis of this aspect of disclosure is limited to the English/Welsh criminal law system.

The PII doctrine has been developed in criminal proceedings only in the past 20 years whereas it was already settled law in civil proceedings from which it was imported. In civil law, the PII doctrine had been characterised as a balancing exercise to assess whether the interest in the proper administration of justice outweighed the interest in withholding certain material to protect the public interest.[125]

The first trace[126] of the PII doctrine in criminal proceedings can be detected in R v Governor of Brixton Prison, ex parte Osman (No 1) where Mann LJ observed that "the seminal cases in regard to Public Interest Immunity do not refer to criminal proceedings at all. The principles are expressed in quite general terms. Asking ourselves why those general expositions should not apply to criminal proceedings, there is no clear answer that they do. It seems correct in principle that they should apply. The reasons for the development of the doctrine seem equally applicable to criminal as well as civil proceedings."[127] It was made clear though, that where disclosure of evidence appeared necessary to prevent a miscarriage of justice it outweighed the public interest and there was no room for a balance to be struck. In

121 Ibid. at para. 17.
122 Ibid. at para. 20.
123 Ibid. at para. 26.
124 *Brandstetter v. Austria*, ECHR, no. 11170/84, 28 August 1991.
125 See *Duncan* v *Cammell Lair and Co Limited*, [1942] AC 624 and *Conway* v *Rimmer*, [1968] AC 910.
126 Before the *ex parte Osman,* in criminal trials, public interest had been contemplated in relation to witnesses who might not be asked to reveal information or documents that might be prejudicial to the state or the public interest. This was the so-called crown privilege. It was extremely rare that a criminal court was asked to withhold material evidence from the defence.
127 *R* v *Governor of Brixton Prison, ex parte Osman,* (1991) 93 Cr App R 202, p. 208.

1994 in R v Keane, the judges reiterated that when the disputed material can prove the innocence of the accused or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.[128] In ex parte Osman it was argued that in these circumstances there would be no balance to be struck whereas in R v Keane the judges preferred to stress the natural outcome of the balancing exercise on such occasions. The common ground that these slightly difference approaches have is that they are both based on the goal that an innocent person must not be condemned and that this prevails over any other interest.
The 1981 Attorney General's guidelines accorded the prosecution wide discretion to withhold material from disclosure in the circumstances analysed above. The guidelines were in fact inspired by the idea that the prosecution alone was entrusted with the delicate function of deciding what should be disclosed and what should be withheld. The court and the defence were not involved in this procedure. The wide discretion granted to the prosecution was believed to be well placed as the integrity and fairness of the prosecution was a guarantee that it would act rightly and properly.

Ten years later the guidelines were abolished. In Ward, the Court of Appeal held that only when PII was at stake could material be withheld from disclosure and, most importantly, such assessment was no longer given to the prosecution but fell within the judiciary powers. The prosecution had become a mere keeper of the material pending the court decision on its disclosure. The judges concluded that the prosecution must give notice to the defence of its intention not to disclose material evidence. When the prosecution was not inclined to have the court decide upon a PII matter the natural consequence would be the abandonment of the prosecution.

11. The UK, the European Court of Human Rights and non-disclosure

11.1 Introduction

The United Kingdom has been brought, several times, before the European Court of Human Rights (ECtHR, Strasbourg Court or Court) for alleged violations of article 6 of the European Convention on Human Rights (Convention). Several judgments concerning the English criminal justice procedure will be analysed in detail in the section dedicated to the ECtHR jurisprudence and disclosure. However, this paragraph offers a short overview of a selection of cases concerning the conflict between the right to disclosure and the interest in withholding material from disclosure on public interest grounds.

On 16 February 2000, three judgments were delivered by the Grand Chamber of the ECtHR, which involved the United Kingdom and concerned the public interest immunity procedure and its compliance with article 6 of the Convention. All the applicants in these trials complained that non-disclosure by the prosecution of

128 *R* v *Keane*, 2 All ER 478.

relevant evidence on the ground of public interest immunity meant that they were denied a fair trial in breach of Article 6, Section 1 and 3 (b) and (d) of the European Convention on Human Rights.

11.2 Rowe and Davis v. The United Kingdom

Mr. Rowe and Mr. Davis were convicted of murder, assault and robbery in relation to three different incidents that occurred on the night of 15/16 December 1988. The prosecution had withheld, during their trial at the Crown Court, without notifying the court or the defence, evidence in relation to the fact that a witness had claimed a reward in order to testify at trial. Only during the appeal trial did the Court of Appeal on two different occasions hear an ex parte application by the prosecution and ruled that the material should not be disclosed. The defence had no role in these hearings.

The Court found that the "procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weighs this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 (1)". [129]

The fact that in the case at stake there had been a subsequent assessment of the interests involved by the Court of Appeal could not be considered an appropriate remedy. The ECtHR held that the judges of the Court of Appeal, unlike the trial judge, were dependent on transcripts of the Crown Court hearings and on the account of the issues given to them by the prosecution for their understanding of the possible relevance of the undisclosed material. The trial judge was in a better position to make that assessment as he had seen the witnesses give their testimony and was fully versed in all the evidence and issues in the case. Furthermore, the Court of Appeal could not assess the need for disclosure throughout the entire trial but was obliged to render its decision ex post facto and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence.[130]

Consequently, the ECtHR found that there had been a violation of article 6(1) of the Convention as the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure had deprived the applicants of a fair trial.

11.3 Jasper v. The United Kingdom and Fitt v. United Kingdom

The case of *Jasper v. the United Kingdom*[131] and the case of *Fitt v. the United Kingdom*[132] are very similar. In both cases, during the domestic trial, the

129 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000, para 63.
130 Ibid. at para. 65.
131 *Jasper v. The United Kingdom*, ECHR, [GC], no. 27052/95, 16 February 2000.
132 *Fitt v. The United Kingdom,* ECHR, [GC], no. 29777/96, 16 February 2000.

prosecution made ex parte applications to the trial judge to withhold material in its possession on the ground of public interest immunity. The defences were notified of the application and could argue their cases before the trial judge but they had no knowledge of the category of material involved. In both cases the trial judges analysed the material and ruled that it should not be disclosed. No reasons for this finding were given to the defence counsels.

The Court found no violation of the right to a fair trial and the principle of equality of arms because, unlike in the case of Rowe and Davis, the ex parte applications had been made to the trial judge who "was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial."[133] The Court was satisfied that the defence counsels were kept informed and were permitted to make submissions and participate in the decision-making process as far as it was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.

The Grand Chamber composed of the same 17 judges delivered both judgments on 16 February 2000. The verdicts were very close, being reached by nine votes to eight. The eight judges who did not accept the conclusions drawn by the majority appended dissenting opinions to the judgment.

Some of the dissenting judges were not satisfied that the procedure followed by the English court could be said to respect the principles of the adversarial proceedings and equality of arms.[134] They argued that the defence had been excluded by the decision-making process which led to the exclusion of the material from disclosure. The fact that the defence could state its case before the judges could not remedy the injustice of the procedure. The defence was in fact unaware of the nature of the evidence at stake and "it was purely a matter of chance whether they made any relevant points".[135] Moreover, the judges felt that, in order to be able to fulfil his functions in a fair trial, a judge should be informed by the opinions of both parties, not solely the prosecution.

Judge Hedigan reached the same conclusion in his dissenting opinion, albeit by different reasoning. His point of departure was the well-established principle that "any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied."[136] He argued that in the cases at stake, despite the fact that the government argued that there were insurmountable difficulties in this regard, there was a viable and less restrictive alternative measure able to protect both interests involved which ought to be preferred and was not. Judge Hedigan referred to the appointment of a special

133 *Jasper v. The United Kingdom*, ECHR, [GC], no. 27052/95, 16 February 2000, para. 56 and *Fitt v. The United Kingdom*, ECHR, [GC], no. 29777/96, 16 February 2000, para. 49.

134 Dissenting opinions of Judges Palm, Fischbach, Vajić, Thomassen, TsatsaNikolovska and Traja, appended to the *Jasper v. the United Kingdom* and *Fitt v. The United Kingdom* judgments.

135 Ibid.

136 *Van Mechelen and Others v. The Netherlands*, ECHR, no. 21363/93, 23 April 1997.

counsel acting on behalf of the defence in the context of the ex parte application. This matter will be analysed below.

11.4 Edwards and Lewis v. The United Kingdom

In the case of Edwards and Lewis the defendants claimed to have been entrapped by the police in committing the offences they were charged with.[137]

Under English criminal law entrapment is a technical term to describe a situation in which a defendant would not have committed an offence if not for the activity of an undercover police officer or an informer acting on police instructions. Although entrapment it is not a defence under English criminal law once it appears that it has occurred, the judge has discretion to order the stay the proceedings.[138] In other words, the trial judge had to make an important decision, which potentially could bring the proceedings to a close.

Before the ECtHR the defendants claimed that their domestic trial was unfair. They stressed that the trial judge, who had to decide on the entrapment claim, had been exposed to material in the course of an ex parte application for non-disclosure, which might have influenced his judgment.

The delicacy of the situation can be better appreciated considering that in relation to Mr. Edwards (one of the applicants) evidence disclosed to the trial judge in the ex parte hearing included material suggesting that the accused had been involved in the same crime (drug dealing) prior to the events which culminated in his arrest. Such evidence goes to the heart of the allegation of entrapment and it weakens the allegation in the eyes of the same judge who will be called upon to decide. It is reasonable to contend that the judge might be influenced by the previous involvement of the defendant in the same crime when deciding on the entrapment claim. The fact that the defence was not represented at any phase and could not counterbalance such an allegation was a grave breach of the principles of a fair trial and equality of arms. In the case of Jasper and Fitt the situation was different as the trial judge who decided the ex parte application, was not called upon to decide on a question of fact and the separation between the judge and the jury maintained the equality of arms ensuring a sufficient safeguard of the rights of the accused.

The Court agreed with the applicants and was satisfied that under the circumstances of the case, the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms and thereby not incorporating adequate safeguards to protect the interests of the accused.

137 *Edwards and Lewis v. The United Kingdom*, ECHR, [GC], no. 39647/98, 27 October 2004.
138 See *R* v *Looseley,* [2001] UKHL 53.

12. The Special Counsel Scheme

12.1 Introduction

Throughout the above case law the European Court of Human Rights seemed to suggest that when the accused's right to disclosure conflicts with public interest there are alternative and less restrictive measures than a pure ex parte hearing with no defence representation. One of these measures which is mentioned in several of the ECtHR judgments is the appointment of a so-called "special counsel" to represent the accused in ex parte applications where the prosecution seeks the authorisation to withhold material from the defence.

On 15 November 1996, the ECtHR delivered its judgment in the Chahal v. United Kingdom case.[139] In this case one of the applicants argued, inter alia, that the reliance placed on national security grounds as the justification for his detention pending deportation prevented the domestic courts from considering whether it was lawful and appropriate. Under English Law (in force at the time) when national security was the ground for a deportation order there was no right to appeal against such an order. The only available means to challenge the lawfulness of the detention was a non-statutory advisory procedure in which the appellant could not be represented although he could make written and/or oral representations to an advisory panel and call witnesses on his behalf. The Home Secretary decided the amount of evidence that would be shown to the person concerned and the panel's advice to the Home Secretary, which was not binding, was not disclosed to the appellant.

In this case the ECtHR granted leave to several human rights organisations to submit observations for the case. They all agreed that the advisory procedure described above did not constitute an effective remedy in cases involving national security. Amnesty International drew the attention of the Court to the procedure followed in Canada in analogous cases. Under the Canadian Immigration Act 1976 a recorded hearing of all the evidence is held before a Federal Court judge.[140] During this hearing the applicant is provided with a statement summarising, as far as possible, the case against him. He has the right to be legally represented and to call evidence. When the confidentiality of security material requires examination in the absence of both the applicant and his or her representative, their place is taken by a "security-cleared counsel" instructed by the court who cross-examines the witnesses and generally assists the court to test the strength of the State's case. The applicant is then provided with a summary of the evidence obtained by this procedure with necessary deletions.[141]

Following the Chahal judgment, the United Kingdom introduced the Special Immigration Appeals Act 1997. This bill set up the Special Immigration Appeals Commission which, following in the footsteps of the Canadian model, adjudicates

139 *Chahal v. The United Kingdom*, ECHR, [GC], no. 22414/93, 15 November 1996.
140 The Canadian Immigration Act 1976 has been amended by the Immigration Act 1988.
141 *Chahal v. The United Kingdom*, ECHR, [GC], no. 22414/93, 15 November 1996, para. 144.

the appeals on the merits against the decisions of the Secretary of State (or an immigration officer) made on the grounds of, inter alia, national security. This procedure contemplates the possibility of the appointment of a special advocate to step in when the appellant and his lawyer are excluded on grounds of national security.[142] The appellant has the right to be provided with a summary of the evidence taken in his absence to the extent possible without disclosing information contrary to the public interest.

Rule 7 of the Special Immigration Appeals Act 1997 described the role of the special advocate stating that:

"...The function of the special advocate is to represent the interest of the appellant by -

(a) making submissions to the Commission in any proceedings from which the appellant or his representative are excluded;

(b) cross-examining witnesses at any such proceedings; and

(c) making written submissions to the Commission.

(5) Except in accordance with paragraph (6) to (9) the special advocate may not communicate directly or indirectly with the appellant or his representative on any matter connected with proceedings before the Commission.

(6) The special advocate may communicate with the appellant and his representative at any time before the Secretary of State makes the material available to him.

(7) At any time after the Secretary of State has made the material available under rule 10(3), the special advocate may seek directions from the Commission authorising him to seek information in connection with the proceedings from the appellant or his representative.

(8) The Commission shall notify the Secretary of State of a request for direction under paragraph (7) and the Secretary of State must, within a period specified by the Commission, give the Commission notice of any objection which he has to the request for information being made or to the form in which it is proposed to be made.

(9) Where the Secretary of State makes an objection under paragraph (8) rule 11 shall apply as appropriate. ..."

142 This procedure was first introduced by section 6 of the Special Immigration Appeals Commission Act 1997 and rule 7 of the Special Immigration Appeals Commission (Procedure) Rules 1998 (SI 1998/1881), in proceedings concerned with exclusion or removal of a person as conducive to the public good or in the interests of national security. Similar provision was made by section 91(7) and (8) of the Northern Ireland Act 1998 in relation to national security certificates issued under section 42 of the Fair Employment (Northern Ireland) Act 1976, although no appointment has yet been made under section 91. Similar provision was again made by section 5 of the Terrorism Act 2000 and rule 10 of the Proscribed Organizations Appeal Commission (Procedure) Rules 2001 (SI 2001/443); section 70 of the Anti-Terrorism, Crime and Security Act 2001 and rule 8 of the Pathogens Access Appeal Commission (Procedure) Rules 2002 (SI 2002/1845); and by the Northern Ireland (Sentences) Act 1998, Schedule 2, paragraph 7(2) and the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564), Schedule 2, paragraph 6. The courts have recognized the potential value of a special advocate even in situations for which no statutory provision is made. Thus the Court of Appeal invited the appointment of a special advocate when hearing an appeal against a decision of the Special Immigration Appeals Commission in *Secretary of State for the Home Department* v *Rehman* [2003] 1 AC 153, paragraphs 31-32, and in *R* v *Shayler* [2002] UKHL 11, [2003] 1 AC 247 paragraph 34, the House recognized that this procedure might be appropriate if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service.

On 10 July 1998, in Tinnelly, the ECtHR took note of the above remarking how "in other contexts it had been found possible to modify judicial procedures in such a way as to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice".[143] Therefore, the possibility of safeguarding the right to a fair trial through the appointment of a "security-cleared counsel" to represent the accused in circumstances in which national security and public interest concerns would impose his absence was available for immigration cases. The principle of a "third" or "special" counsel acting on behalf of the defendant had become part of the English legal system.[144]

The Auld Report showed sympathy to the special counsel scheme, recommending its introduction in cases where the prosecution wished to seek ex parte non-disclosure on grounds of public interest immunity. Sir Auld stressed that the introduction of a special counsel "would restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications".[145]

The case of Edwards and Lewis seemed to suggest that the appointment of a special counsel to represent the accused in criminal cases where a PII application was filed could be a viable possibility for avoiding violations of the defendant's right to a fair trial. The Court dwelled on the introduction in the English legal system of legislation envisaging the appointment of a "special counsel" in certain cases involving national security.[146] This judgment and its potential impact on domestic criminal procedure raised concerns over the practicability of this option on a regular basis. Following Edwards and Lewis, the whole procedure was under the spotlight in criminal courts up and down the country.[147]

The case of R v H and C gave the House of Lords the opportunity to shed some light on the interpretation of the ECtHR judgment.[148] In this case, the defendants were charged with conspiracy to supply heroin. The defence sought disclosure of material pertaining to covert intelligence sources, including surveillance, which had led to the arrest of the two defendants. Part of their defence was that there had been serious police misconduct that could lead, if proven, to the stay of the proceedings or to the exclusion of evidence.[149] The prosecution opposed such a request on public interest immunity grounds.

143 *Tinnelly & Sons Ltd and Others v. The United Kingdom*, ECHR, no. 20390/92, 10 July 1998, para 78.

144 The ECtHR mentioned the new figure of the "special counsel" in *Rowe and Davis, Jasper*, and *Fitt,* quoting extensively the Special Immigration Appeals Act 1997.

145 *The Review of the Criminal Courts in England and Wales* ("the Auld Report"), 2001, para. 194.

146 *Edwards and Lewis v. The United Kingdom*, ECHR, [GC], no. 39647/98, 27 October 2004, paras. 43-45. Specifically the Court referred to the provisions contained in the Special Immigration Appeals Commission Act 1997 and the Northern Ireland Act 1998.

147 Comment of Mr. Mccoubrey, acting on behalf of the Crown, in *R* v *H and C*, interlocutory appeal judgment [2003] EWCA Crim. 2847.

148 *R* v *H and C*, [2004] UKHL 3.

149 At a preparatory hearing, the counsel of H indicated that his client wished to mount a challenge to the legality and propriety of the police operation, and the integrity of the police surveillance evidence. He indicated that his client's case would involve allegations of the planting of evidence, and the falsification of observations. He indicated that it was his client's intention to make an application to stay the prosecution as an abuse of process on the grounds of serious executive misconduct and/or illegality on the part of the investigating officer and/or to seek the exclusion of evidence on the same grounds under section 78 of the Police and Criminal Evidence Act 1984.

Before the trial judge, the defendants relied heavily on the judgment of the ECtHR in Edwards and Lewis, claiming that, since the judge might be called upon to stay or dismiss the case or to exclude evidence, he was required to appoint a special counsel to act on behalf of the defendants at any public interest immunity hearing held in the absence of the defendants and their legal representatives.

The trial judge agreed and stated:

"I have just said, I do not feel able to ignore or to circumvent the decision in Edwards. That its consequences are inconvenient or novel or unusual are no grounds for concluding that the present case does not fall within its ambit. I have already ruled that Edwards does not have the consequence in this case of making the examination of sensitive material a matter for an open court investigation. What the decision in Edwards and Lewis does tell me, however, is that if there is not an independent Counsel appointed, so as to introduce an adversarial element into the public interest immunity enquiry, there is a risk that the trial will be perceived to be unfair, and therefore to be a violation of Article 6.1 of the Convention. I am not prepared to contemplate that." [150]

The prosecution filed an interlocutory appeal that was successful. The Court of Appeal accepted that in "rare and exceptional cases" the appointment of a special counsel might be necessary to safeguard the right of the accused in PII but it found that in the case at stake it was premature.[151] It held that Edwards and Lewis did not bind the trial judge in the way in which he would be bound by a decision of the Court of Appeal and in any event, Edwards and Lewis did not require the appointment of a special counsel at that stage.

The Court of Appeal granted leave to appeal to the House of Lords and asked two questions:

"Are the procedures for dealing with claims of public interest immunity made on behalf of the prosecution in criminal proceedings compliant with Article 6 of the European Convention on Human Rights and Fundamental Freedoms? If not, in what way are the procedures deficient and how might the deficiency be remedied?"

The House of Lords acknowledged the possibility of the appointment of a special counsel to represent a defendant in an ordinary criminal trial when PII matters arise. It made clear that even this appointment would not suffice to resolve all the problems connected to PII applications. It went on to state that all the ethical and practical problems linked to this choice might not be a deterrent where the interest of justice requires such an appointment. Nevertheless, the judges stressed that "such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant." [152]

150 *R* v *H and C*, Trial judgment, paras 42-43.
151 *R* v *H and C*, [2004] UKHL 3, para 34.
152 Ibid. at para. 22.

The House of Lords provided an interpretation of the Edwards and Lewis ECtHR judgment that reduced its impact on the criminal procedure in PII matters. The appellants argued that following Edwards and Lewis there would be a violation of article 6 of the Convention if a judge ruled on PII matters in the absence of adversarial arguments on behalf of the accused, where the material the prosecution is trying to withhold is or may be relevant to an issue of fact on which the judge has to decide. This is especially so when such a decision can effectively determine the outcome of the proceedings.

The House of Lords refused those submissions that "seek to place the trial judge in a straitjacket."[153] The House reclaimed a case-by-case approach to the matters rather then a general and strict rule. It found that it would be "entirely contrary to the trend of Strasbourg decision-making to hold that in a certain class of cases or when a certain kind of decision has to be made a prescribed procedure must always be followed."[154]

The UK was satisfied with this narrow interpretation to the extent that it decided to discontinue its appeal, pending before the Grand Chamber of the ECtHR, of the Edwards and Lewis judgment. This judgment restated the predominance of the prosecution discretion in disclosure matters. The House of Lords was satisfied that if the prosecution correctly applies disclosure the occasion where a judicial ruling is necessary would be scarce.
The special advocate or special counsel scheme has been employed rarely so far in criminal trials. The Attorney General, in consultation with the Criminal Bar Association, has prepared a list of eligible special advocates. Once a special counsel is appointed, he acts on behalf of the defendant. He studies the case to familiarise himself with it. He then meets the defence in order to understand the essence of the defence's case and to identify what material they are trying to have disclosed and why. The special advocate then goes into a closed session where he is shown all the material the prosecution had withheld from the defence. In the closed session, the judge will only be shown the material whose disclosure the special advocate considers relevant to the case. If the special advocate, after having seeing the material, needs further instructions he has to submit in writing to the judge the questions he would like to ask to the defence. The special counsel can speak again with the defendant only when authorised by the judge. Finally, the special advocate hands his submissions in to the judge.

The procedure is rather elaborate and its adoption on a routine basis entails the resolution of ethical and practical problems. As noted by the House of Lords, ethical concerns arise from the way in which the special counsel is required to act which is "unknown to the legal profession."[155] The relationship between the special advocate and the accused is, indeed, rather unusual considering the impossibility of the former to take full instructions from his client, to report to him, not to mention

153 Ibid. at para. 33.
154 Ibid. at para. 34.
155 Ibid. at para. 22.

his lack of responsibility toward the accused and the absence of the customary confidence inherent in any ordinary client-lawyer relationship. Practical obstacles emerge in relation to the delay that the appointment of a special advocate might cause due to the time he must be allocated to familiarise himself with the case; in relation to the high expenses that the engagement of a skilled and experienced counsel adds to the case; and in relation to the necessity of his presence throughout the trial or at least his availability in order to assist the court in its continuing duty to review disclosure.

12.2 The special counsel scheme applied to terrorism cases

This subsection analyses the employment of the special advocate scheme in delicate cases concerning terrorist suspects. Dealing with the threat of terrorism is very difficult not only because of the covert nature of the threat, but also because it is a field that from a legal perspective amplifies the stark contrast between the need to conceal information from the suspect on public interest grounds, such as national security, and the suspect's right to a fair trial.

In 2009 the European Court of Human Rights and the House of Lords (HL) delivered two judgments concerning the effectiveness of the employment of the special advocate scheme in procedures regulating closed hearings where a suspected international terrorist would be denied participation and disclosure of the information on which the government based its suspicion. This jurisprudence shaped the contours of the role of the special advocate and it will be examined in order to understand the implications of the use of this rather peculiar legal figure. First, a brief description of the relevant domestic law and the procedure envisaged therein is provided for a better understanding of the tension between the relevant interests at stake and the balance that the Courts struck.

12.2.1 Relevant domestic law

Following the terrorist attacks of 11 September 2001, the United Kingdom enacted the Anti-terrorism, Crime and Security Act 2001 (ATCSA) that conferred to the Secretary of State the power to issue a certificate in order to detain an individual suspected of being an international terrorist with a view to his intended deportation.[156] This provision also applied to cases where the individual's deportation was temporarily prevented.[157] The act regulated the possibility of appeal against the "deportation certificate" before the Special Immigration Appeals Commission (SIAC). The SIAC is a tribunal composed of independent judges. The procedure envisaged the right to appeal (on a point of law) against its decisions to the Court of Appeal and the

156 Anti-terrorism, Crime and Security Act 2001, part 4, article 21-23.

157 Anti-terrorism, Crime and Security Act 2001, part 4, article 21-23. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 that prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article (e.g. torture). If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. See *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009, p. 5.

House of Lords.[158] The procedure regulating the appeal before SIAC allowed it to consider not only material which could be made public (open material) but also material which, for reasons of national security, could not become public (closed material). The appellant or his representatives could not see the closed material. Consequently, in these cases one or more security-cleared counsels, referred to as "special advocates", would be appointed by the Solicitor General to act on behalf of each appellant. The open material was served to the appellant and his legal representative who could discuss it together with the special advocate. In the course of the closed hearing the special advocate was also shown the closed material but from that moment on he could not interact with the appellant without authorisation from the SIAC. In respect of each appeal against certification the SIAC issued both an open and a closed judgment. The special advocate could see both but the detainee and his representatives could only see the open judgment.

In 2004, the House of Lords held by a simple majority that this procedure (regulated by section 23 of the ATCSA) was incompatible with the European Convention on Human Rights and Individual Freedoms (Convention).[159]
A majority of judges thought that the 2001 ATCSA was contrary to the Convention (Art. 14 ECHR) because it discriminated between British nationals and foreign nationals. The provisions of the act were indeed applicable only to non-British nationals.

The Parliament responded by enacting the Prevention of Terrorism Act 2005 (PTA). This piece of legislation granted the Secretary of State the power to make control orders.[160] The relevant provision states that:

The Secretary of State may make a control order against an individual if he:

(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

(b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

A control order is "an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism".[161] A control order may impose on the targeted individual (controlee) any obligation that the Secretary of State considers necessary for purposes connected to the prevention or restricting of involvement by that individual in terrorist activity. [162]

158 The Special Immigration Appeals Commission ("SIAC") was set up in response to the Court's judgment in *Chahal v. The United Kingdom.* See paragraph 9.
159 *A and others* v *Secretary of State for the Home Department,* [2004] UKHL 56.
160 Prevention of Terrorism Act 2005, section 2(1).
161 Ibid. at section 1(1).
162 Ibid. at section 1(3)(4). Obligations which might be imposed by a control order include: restrictions on the possession of specified articles or substances (such as a mobile telephone); restrictions on the use of specified services or facilities (such as internet access); restrictions on work and business arrangements; restrictions on association or communication with other individuals, specified or generally; restrictions on where an individual may reside and who may be admitted to that place; a requirement to admit specified individuals to certain locations and to allow such places to be searched and items to be removed there from; a prohibition on an individual being in specified location(s) at specified times or days; restrictions to an individual's freedom of movement, including giving prior notice of proposed movements; a requirement to surrender the individual's passport; a requirement to allow the individual to be photographed; a requirement to cooperate with surveillance of the individual's movements or communications, including electronic tagging; a requirement to report to a specified person and specified times and places.

Section 3 of the PTA regulates the judicial supervision of the way in which the Secretary of State exercises his power to impose control orders. Specifically, the court must assess the Secretary of State's decision concerning the requirements for a control order and the necessity of the obligations imposed by the order. This determination is made in the course of the hearing provided for in section 3(10) of the PTA (the section 3(10) hearing). In the section 3(10) hearing the special advocates, appointed by the Attorney General, safeguard the interest of the controlees.[163] For the purpose of this research, it is not necessary to dwell on all aspects of the procedure but it is sufficient to point out that it resembles the procedure that takes place before SIAC in relation to the appointment of a special advocate. The latter in fact represents the interest of the controlee in the course of the closed hearings where he can make both written and oral submissions to the court and cross-examine witnesses.[164] Once the special advocate has been shown the closed material he cannot communicate with the controlee without the leave of the Court.
Both pieces of legislation analysed above disciplined the appointment of a special advocate in order to represent the individual targeted by a provision that in essence limited his right to disclosure in hearings where material withheld on public interest grounds would be used by the judge to form his opinion.

As mentioned above, the UK, following the relevant case law of the ECtHR in relation to the PII hearings discussed above, introduced the special advocate scheme in order to assure the compliance of the procedure with the European Convention on Human Rights. Nonetheless, through very recent jurisprudence of the ECtHR and of the HL it has emerged that there are circumstances where the appointment of a special counsel is not sufficient per se to avoid a breach of the Convention.

12.2.2 The Judgment of the ECtHR in A. and Others v. The United Kingdom

The ECtHR was faced with 11 applications filed by individuals who had been detained pursuant to the provisions of the 2001 ATCSA.[165] They all complained about the SIAC procedure and in particular about the lack of disclosure of material evidence except to special advocates who were not allowed to consult with the detainees.[166] They argued, inter alia, that the procedure violated article 5(4) of the Convention which states:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The applicants stressed that the SIAC's judgments upholding the certification against them were based on closed material that had not been shown to them.

163 Civil Procedure Rules (CPR), Part 76.2.
164 Ibid. at Part 76.24.
165 *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009.
166 Ibid. at para 195.

The applicants claimed that "it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond."[167] To respond to the case effectively implied the possibility of giving informed instructions to the special advocate so to enable him to challenge the closed material in light of the dispositions of the detainee. In order to do so the latter had the right to be provided at least with the core of the information upon which the certification had been issued.

The government argued that there were valid public interest grounds for not disclosing the closed material and that it was a settled principle in the Strasbourg jurisprudence that the right to disclosure was not an absolute right. It suggested that the applicants' view, if upheld, would elevate the right of an individual to disclosure of relevant evidence to an absolute right privileged over the rights of others including the right to life and the interests of the state in preserving the effectiveness of its intelligence. Such an erroneous interpretation of the right of disclosure would put the protection the state must grant its citizens in jeopardy as well as ignoring the well-settled principle, inherent in the Convention, that the general interests of the community must be balanced against the rights of an individual.[168]

A human rights organisation that was granted leave to intervene highlighted how special advocates had complained about serious difficulties encountered in representing appellants before the SIAC in closed proceedings due to the prohibition of consulting with the appellants in relation to closed material. Particularly, the lack of instructions received from the appellants minimised their role in such proceedings.[169]

Furthermore, it was brought to the attention of the ECtHR that in the Canadian procedure, which inspired the establishment of SIAC, in closed proceedings before the Security Intelligence Review Committee (SIRC)[170] special advocates were allowed "to maintain contact with the appellant and his lawyers throughout the process and even after the special advocate was fully apprised of the secret information against the appellant."[171]

The Court reaffirmed the principle that, although the right to a fair criminal trial includes a right to the disclosure of all material evidence in the prosecution's possession, sometimes it may be necessary to withhold certain material from the

167 Ibid. at para 195.
168 Paragraph 4.77 of the Government's Memorial to the Court quoted at paragraph 50 of the Judgment.
169 *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009, para. 199. The submission of the special advocate quoted by Liberty were received as evidence by the House of Commons Constitutional Affairs Committee in the course of its inquiry into the operation of SIAC and its use of special advocates which followed the the judgment of the House of Lords in December 2004, declaring Part 4 of the 2001 Act incompatible with Articles 5 and 14 of the Convention.
170 The Security Intelligence Review Committee considered whether a Minister's decision to remove a permanently resident foreign national on national security grounds was well founded.
171 *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009, para. 198.

accused on public interest grounds. In these cases there is a need to counterbalance the restriction of the accused's rights through certain procedural tools.
The ECtHR accepted that "during the period of the applicants' detention the activities and aims of the al' Qaeda network had given rise to a public emergency threatening the life of the nation."[172] Consequently, there was a strong interest in maintaining the secrecy of the government sources of information concerning the terrorist network. The applicant's right to procedural fairness provided for in article 5(4) of the Convention had to be balanced against these crucial considerations.[173]

The judges found that the SIAC, being a fully independent court and being familiar with both open and closed material was in the best position to assess what had to be disclosed to the applicants to enable them to effectively challenge the allegations against them. It considered that the special advocate "could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open and adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings."[174] However, and this is the core of the judgment, the effectiveness of the special advocate's function was impaired unless "the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate."[175]

Although such assessment needs to be done on a case-by-case basis, the Court stated that the procedural requirements of article 5(4) of the Convention would not be satisfied if (where the open material was made solely of general assertions) the SIAC based its decision to uphold a certification and maintain the detention only or to a decisive degree on closed material. This circumstance in fact would render it impossible for the applicants to challenge the allegations against them.

Applying this important principle to the case at stake the ECtHR considered that the main allegations against the two applicants were that they had been involved in fund-raising for terrorist groups linked to al' Qaeda. The open evidence concerned solely large sums of money moving through the bank account of one applicant and the involvement of the second applicant in raising money through fraud. The applicants were not disclosed any material about the link between the money raised and terrorism. The Court found that there had been a violation of article 5(4) of the Convention because these applicants were not in a position to effectively challenge the allegations against them.[176]

This judgment elevated the discussion surrounding the special advocate scheme to a different level. It recalled that the appointment of a special advocate might indeed counterbalance the restriction of an accused's right to disclosure but it went further by

172 Ibid. at para. 216.
173 The Court at paragraph 217 stated that "in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect (*Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001 and see also see *Chahal,* cited above, §§ 130-131)."
174 *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009, para. 220.
175 Ibid. at para. 220.
176 Ibid. at para. 223.

giving guidance on its functioning. In other words, the Court stated that the appointment of a special advocate is not sufficient, per se, to guarantee that proceedings comply with the Convention when the accused is not given sufficient information to enable him to give effective instructions to the special advocate in relation to the allegations against him. This finding balances the right to a fair trial, including the right to disclosure, and the public interest. Furthermore, it highlights that a special advocate must be put in a position to be as effective as possible in his function through disclosure of a core irreducible minimum of information to the accused person.

12.2.3 The Judgment of the House of Lords in Secretary of State for the Home Department v. AF

This ECtHR judgment analysed above assisted the House of Lords in delivering its judgment in the case of the Secretary of State for the Home Department v AF on 10 June 2009.[177]

Previously, in 2007, the House of Lords had issued a judgment related to the tension between the control order procedure under the 2005 PTA and article 6 of the Convention.[178] On that occasion the majority of the HL acknowledged that in relation to the hearing held pursuant to article 3(10) of the PTA there might be cases, albeit rare ones, where the failure to disclose material to the controlee would be incompatible with the article 6 requirement of a fair trial.

Baroness Hale of Richmond was not confident on that occasion that Strasbourg would find that every control order hearing where the special advocate procedure had been used would be sufficient to comply with article 6. Nevertheless she held that, with strenuous efforts from all, it should usually be possible to accord the controlled person "a substantial measure of procedural justice", quoting the expression adopted by the ECtHR in Chahal.[179]

The House of Lords, at the time, adopted a flexible approach and whilst recognising the potential conflict between the article 3(10) hearing and article 6 of the Convention held that even in cases where the decision to uphold a control order was based solely on or to a decisive degree on closed material, substantial justice might still be possible. The main question was whether the article 3(10) hearing, taken as a whole, had been fair. In this assessment it is essential to investigate how effectively the special advocate had been able to challenge the withheld material on behalf of the controlled person and what difference its disclosure would have made. The House of Lords therefore did not declare the PTA incompatible with the European Convention on Human Rights.

On 10 June 2009, the HL delivered its judgment in the case of Secretary of State for the Home Department v AF. In this case the three appellants were subject to control

177 *Secretary of State for the Home Department* v *AF* [2009] UKHL 28, 10 June 2009.
178 *Secretary of State for the Home Department* v *MB* [2007] UKHL 46, 31 October 2007.
179 *Chahal v. The United Kingdom*, ECHR, [GC], no. 22414/93, 15 November 1996, Concurring Opinion of Judge Jambrek, para. 1.

orders involving significant restrictions of their liberty which had been issued by the Secretary of State pursuant the Prevention of Terrorism Act (PTA) 2005. The appellants claimed that their right to a fair hearing had been violated insofar as the judge confirming the order relied upon material received in closed hearing the nature of which was not disclosed to the appellants. The main question that the House of Lords had to answer was again whether the procedure regulating the article 3(10) hearings, where the issuance of control orders was at stake, complied with the right to a fair hearing provided for in article 6 of the European Convention on Human Rights. The judgment of the ECtHR in A. and Others v. The United Kingdom inevitably influenced the answer the House of Lords gave to this question.

The Secretary of State suggested that the ECtHR's judgment had not laid down an "inflexible principle that there can never be a fair trial if the basis of the Secretary of State's suspicion [on which the control order is based] is to be found solely or to a decisive degree in the closed material" and a case by case approach should be followed.[180]

The House of Lords received submissions from the special advocates who had represented the appellants in the closed hearings. They explained what they are able to do in the course of a typical closed control order hearing and what precisely the difficulties they encounter are due to the lack of adequate disclosure to the appellants of a sufficient statement of the allegations against them. It is interesting to quote the relevant parts:

"...Cross-examination by special advocates can usually deal with evidential reliability, possible alternative and innocent inferences, internal consistency or contradictions, the significance of pieces of evidence and the strength of the case overall. What they cannot do without instructions or evidence is to provide evidence or explanation which contradicts or explains the closed essential features of the case against him or offer alternative inferences which they are not aware of or lack any support for...[181]

...The real value lies in the potential for a controlled person to provide evidence which shows a different picture or an innocent interpretation or explanation which counters the basis for the adverse inferences and does so beyond that which the special advocates may suggest. This would either be because there would now be an evidential basis for those suggestions or because the special advocate may not be able to anticipate or put together what the controlled person's position is. He may also be able to provide the special advocate with information or statements to be deployed as the special advocate sees fit, which the court and SSHD [Secretary of State for the Home Department] may never know of."

The special advocates were able to shed light on the principles applied by the courts in article 3(10) hearings in relation to disclosure of closed material. They stated that the fact that closed material might contain exculpatory documents is not an

180 *Secretary of State for the Home Department* v *AF* [2009] UKHL 28, 10 June 2009, para 52.
181 Ibid. at para 54.

effective argument to prove the necessity of disclosure; that disclosure is considered as publicising the information to the whole world and not just the controlee; and that the security services raise serious national security concerns and accordingly very convincing material is required before such powerful considerations can be overcome.[182]

The submissions stressed the importance of the disclosure to the controlee of the essential features of the case against him in order to enable the special advocate to discharge his functions effectively. It also made clear that the scope for contesting the Secretary of State's objections to disclosure is very limited and that the vast majority of those objections are upheld despite the fact that they seem to be class of claims related to the type of information rather than to the specific case.

The Lords identified two main policy considerations in support of the rule that a trial procedure is never fair when a party is not aware of the case against him. First, that there are cases where the court is not in the position to be confident that disclosure would make no difference. "Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge."[183] The second consideration concerns the resentment felt by a party to legal proceedings where they cannot influence the result. Such resentment cannot be underestimated as it belongs to the entire community whose confidence in the justice system is essential. It is therefore crucial that justice is seen to be done rather than asking the community to unquestionably accept it.[184]

A corollary of this judgment is the refusal of what was referred to as the "makes no difference" principle that supported the non-disclosure of the case against a party to proceedings when the closed material was so probative of his guilt (in these cases of his involvement in terrorist activity) to believe that any contribution from the controlee would make no difference from the point of view of reaching the right decision. The House of Lords stated that the answer to the question what difference disclosure might have made is that it is almost impossible to know and that for a judge to hold that a hearing where the party affected has had no opportunity to answer is a fair hearing negates the judicial function which is crucial to the controlled order system.[185] In sum, the core principle is that even in cases where the accused is thought to have no conceivable answer to the case against him in light of the closed evidence he must be given "sufficient information to enable his special advocate effectively to challenge the case that is brought against him."[186]

182 Ibid. at para 104.
183 Ibid. at para 63.
184 Ibid. at para 63.
185 Ibid. at para 84, Lord Hope of Craighead recalling the dissenting opinion of Sedley LJ in the Appeal Court Judgment in *Secretary of State for the Home Department* v *AF* [2009] 2 LR 423, para 113.
186 *Secretary of State for the Home Department* v *AF* [2009] UKHL 28, 10 June 2009, para 85.

Interestingly, the House of Lords noted that the Grand Chamber of the ECtHR had not insisted on the disclosure of evidence but had limited its findings to the necessity of disclosing to the accused a statement of the allegations against him. The Lords therefore stated that the controlee is not entitled to the disclosure of the underlying material or the sources from which it derives but solely to the disclosure of sufficient information about the allegation against him. The House of Lords acknowledged, nonetheless, the existence of cases where the allegations and the underlying material cannot be separated. In these cases, if the Secretary of State is not willing to disclose more closed material the control order will be quashed. The fact that this scenario might be common to a considerable number of cases can be seen as an indication that the "system is unsustainable."[187]

The House of Lords concluded that "the Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order."[188] In other words, a control order cannot be confirmed by the court if the controlled person has not had a fair hearing and a hearing is only fair if the controlee has had the possibility to effectively challenge the allegations against him. To do so he has to be put in the position of giving informed directions to the special advocate to challenge the adverse evidence. Therefore, the disclosure of sufficient information about the allegation against the controlee must always be provided. It will be for the judges to assess how much disclosure is necessary in each case for the controlee to effectively challenge it.[189]

13. Concluding remarks

The law on disclosure has been in constant development over the past 30 years. Case law and statutory law have characterised it alternatively more or less narrowly. The process has been compared to a pendulum swinging periodically between more open and more restricted disclosure of unused material.[190] Political trends have played a role in the statutory interventions and the major miscarriages of justice detected in the early 1990s have also been influential.

By the end of the Middle Ages, England had developed an adversarial criminal system. A lengthy process that had begun from a radically different conception of the trial in general and of disclosure in particular than from that in place today. In fact, in the late sixteenth to early seventeenth century, the trial was conceived as an altercation between the victim and the accused. Lawyers were not contemplated and could act neither for the prosecution nor for the defence. The system was based

187 Ibid. at para 87.
188 Ibid. at para 65.
189 Ibid. at paras 102-103 and 106, Baroness Hale of Richmond. The question of how much information to disclose was decided in the context of litigation before the domestic courts, following the principles laid down in this case. See, for example, *Secretary of State for the Home Department* v *AS* [2009] EWHC 2564 (Admin); *Secretary of State for the Home Department* v *CE* [2011] EWHC 3159 (Admin); *AH* v *Secretary of State for the Home Department* [2011] EWCA Civ 787; and *AN, AE & AF* v *Secretary of State for the Home Department* [2010] EWCA Civ 869. See also Resolution CM/ResDH(2013)114 adopted by the Committee of Ministers of the Council of Europe on 6 June 2013 at the 1172nd Meeting of the Ministers' Deputies.
190 Calvert-Smith D. QC, *The prosecuting authority's role; Disclosure under the CPIA 1996*: British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.

upon the idea that no disclosure of the prosecution's case (or rather, the victim's case) should occur before trial. The defendant remained unaware of the charges and the evidence against him and could not prepare his case beforehand. The essential feature of the criminal trial was the spontaneous reaction to the defendant to the charges against him. Preserving this spontaneity was crucial for the effectiveness of the truth seeking process. Therefore, pre-trial disclosure was perceived as a weakness of the system the functioning of which would be undermined by any information received by the accused concerning the case against him.
This characterisation of disclosure is in stark contrast with the relevance that the disclosure of information has gained in modern English/Welsh criminal procedure. From the analysis carried out it emerges that the pre-trial disclosure of the prosecution's case and evidence against the accused is an uncontroversial and settled principle of justice. In a criminal justice system using an adversarial model, based on the "two cases approach" it is fundamental that the accused is informed in advance of the case being made against him, and specifically of the evidence gathered, in order to allow him to prepare his defence. This principle is in line with the adversarial idea of the trial as a confrontation between two parties under the supervision of an impartial umpire that is the judge. Only through pre-trial disclosure is the defence in a position to fight its battle.

What appears more controversial and difficult to reconcile with the adversarial tradition is the prosecution's duty to disclose unused material, which consists of all the material gathered in the course of a criminal investigation that the prosecutor does not intend to use at trial. In addition, the introduction of defence disclosure obligations, which have become even stricter under the 2003 CJA, has proved difficult to digest for the defence practitioners and its application has been of a poor standard. As noted by Quirk, as far as prosecution's disclosure of unused material is concerned, the difficulties experienced by the system belong to two different but intertwined levels: the practical level and the cultural level.[191]

On the practical level, the golden rule is that full disclosure of unused material should be made in order to avoid the recurrence of major miscarriages of justice caused by the arbitrary withholding of such material.[192] The disclosure of unused material is merely the last stage of a more articulated and complex process whose functioning relies on the accuracy of the activities carried out by different actors in the process. The process can be compared to an assembly line in a factory where the quality of the final product depends on the precision and diligence of the previous stages where all the components were assembled. A minor mistake earlier in the chain could lead to unforeseen and major defects in the final product marketed.

Prosecution in England and Wales is carried out by different protagonists who play separate roles in the same framework. They are the police, investigators, disclosure officers, prosecutors and trial counsel. The English/Welsh criminal system entrusts the police with delicate functions in relation to the retaining,

191 Quirk, above n. 80.
192 *R* v *H and C* [2004] UKHL 3, at 147.

recording and scheduling of material. The prosecution bases its decisions to disclose on the work conducted by investigators and disclosure officers. Compiling the schedule of sensitive material requires not only fairness and impartiality but also an assessment of the "materiality" of the information to the issues potentially at stake in a criminal trial. The disclosure officer in fact will schedule material as sensitive if he believes that its disclosure might create a real risk of prejudicing an important public interest.
This crucial assessment should be performed by the prosecutor rather than by police investigators. The prosecution should decide what material has to be recorded and to which schedule it should be allocated. On this point, the recommendations made by the 2011 review are sensible insofar as they advocate the prosecutor's early involvement with the investigators. A deeper and earlier involvement of the prosecution at this stage would allow him to rely on his own assessment of the material and in turn to have an "early grip" on disclosure obligations. The police would retain the task of generating, gathering and recording material in the course of criminal investigations. Police officers are trained for these tasks and possess the necessary skills, whereas they lack the capacity to assess material in terms of its possible relevance in a trial. In other words, the system places all the responsibility for disclosure on the prosecution but it does not take the maxim that "lawyers are only as good as the material given to them" into account.[193]

The status quo seems problematic also from the perspective of the defence, as it appears to have not sufficiently safeguarded possible misconduct and mistakes made by the police. Frequently, the police disregard or simply lose material or evidence.[194] To a certain extent a broader involvement of the prosecution in the assessment of the material could guarantee more accurate and competent scrutiny. The police hold a key responsibility that is not subordinated to regular supervision and therefore a mistake at this stage will most likely go undetected and if detected would be difficult if not impossible to remedy at a later stage.
On a cultural level, it seems that the disclosure process regulated by the CJA does not take the tradition of the criminal system in which it operate into account and the characterisation of its main figures.[195]
With regard to the police, the disclosure regime requires them to pursue any line of inquiry regardless of whether they point towards the guilt or innocence of the suspect. This investigative role clearly belongs to an inquisitorial tradition rather than an adversarial one. Studies have shown that the police still perceive themselves (and third persons perceive them) as an agent for the prosecution.[196] This perception could lead them to undertake investigations with a view to corroborating the case of the prosecution against a suspect rather than pursuing lines of inquiry that indicate otherwise.

The disclosure scheme seems to confer a double role on the prosecution. In fact, alongside building the case against the accused, the prosecution discharges certain functions that should safeguard the right of the accused to a fair trial as part of the disclosure

193 Quirk, above n. 80 at p. 52
194 Plotnikoff and Woolfson, above n. 60 at p. 25.
195 Quirk, above n. 80 at 42-59.
196 Quirk, above n. 80 at 42-59.

regime. Specifically, the prosecutor should apply a test when deciding upon disclosure which, although objective in nature, requires the assessment of material from the defence's perspective or, in other words, to empathise with his opponent. Requiring the prosecution to act as a minister of justice is a rather high expectation that in essence goes against its nature and its tradition in an adversarial system. The heavy responsibilities placed on the prosecution have blurred the edges of the adversarial system.[197] In the name of the fair administration of justice the prosecution is expected to perform tasks that might benefit the opponent.[198] Based on these premises, the effectiveness of the system depends on the way in which the police and the prosecution handle the conflict between the responsibilities and expectations placed on them and their cultural tradition. Such a conflict can be difficult to reconcile.

As far as the defence's disclosure is concerned, its introduction into the criminal justice system represents a radical change in criminal procedure and a clash with the adversarial tradition where the defence ought not to disclose its case before trial. A defence non-disclosure provision is perceived as part of an adversarial scheme where the prosecution has to prove its case and the accused has the privilege of avoiding self-incrimination. It is therefore understandable that it was difficult for many scholars and practitioners to accept.

Nonetheless, the adversarial model is not immutable and it can be argued that in England, it has departed from its pure version in many other respects (for instance attributing a more active role to the judges) and that also other adversarial systems (e.g. the U.S.) have adopted defence disclosure provisions in an even stricter fashion than England.

However, it seems that the way the CJA characterised the defence disclosure obligations is too strict and not reflected by similar obligations on the side of the prosecution. In its original version, the CPIA merely required that the defence statement contain an outline, laid out in general terms, of the nature of the proposed defence and an indication of the matters on which the accused took issue with the prosecution. Although it proved ineffectual, this rather light obligation imposed on the defence was easier to reconcile with the idea that defence disclosure can improve the disclosure scheme by drawing the prosecution's attention to material relevant to the defence outlined. It was also coherent with the disclosure process envisaged by the CPIA where the test of second prosecution disclosure depended on its materiality to the issues in the case highlighted by the defence.

On the contrary, the CJA introduced more strict and demanding defence obligations. The defence statement has to outline the nature of the defence that will be offered at trial. The expression "general terms" has been removed. Furthermore, the accused has to indicate not only points of fact but also points of law that he intends to take to trial and any authority he intends to rely on for that purpose. What is also questionable is the defence's duty to disclose the details of all the experts that it has contacted to commission a report to potentially use during the trial.

A dissenting member of the commission who had worked on the Auld report (discussed above) noted that disclosure is designed to be helpful to the prosecution

197 Plater, above n. 6. Also Niblett, above n. 5.
198 *R* v *Preston*, (1994) 98 Cr App R 405, p. 415.

and more generally, to the system. However, he also stated that it is not the job of the defendant to be helpful either to the prosecution or to the system. His task is simply to defend himself. Rules requiring the disclosure of an alibi and expert evidence in advance are reasonable exceptions to this general principle.[199] Nonetheless, what the system seems to expect is cooperation between the accused in order to accomplish effective administration of justice. This is a high expectation, which does not consider the nature and the tradition of the defence in the criminal system or the attitude of defendants towards such a system that is prosecuting them. Whereas a general outline of the defence's case might be helpful to discharge disclosure obligations and to steer the trial towards the most relevant legal issues, the defence obligations as depicted in the CJA seem too strict and unbalanced. They require too much from a defendant and tend to tie him to the defence indicated in the statement exposing him to the risk of negative inferences should discrepancies arise between the content of the statement and the defence during the trial.

The disclosure scheme seems to ignore the wide ranging and proven malfunctioning of the previous milder defence disclosure duties. In fact, it introduced stricter requirements for the defence statement but did not tackle all the concerns expressed by defence practitioners nor the prosecution's discontent with the lack of the content of most defence statements.

The English/Welsh criminal justice system, after a somewhat liberal beginning following from the Ward judgment, seems to have shifted back towards a more restrictive approach to disclosure. It reduces the prosecution's disclosure of unused material and requests more detailed and specific pre-trial disclosure of the defence's case. The disclosure scheme appears to expect its players to carry out their duties in a rather peculiar fashion. Police officers are expected to pursue any line of inquiry in their investigations. They are entrusted with the delicate responsibility of dividing the material gathered into sensitive and non-sensitive. Usually, the prosecution will not supervise the police's work in this regard and will rely on the schedule given to it. The system requires the prosecution to build the case against the defence and at certain stages of the disclosure procedure to empathise with its adversary by safeguarding his rights. The defence has been burdened by strict disclosure requirements but it has not been granted adequate safeguards in ex parte applications for the withholding of material from disclosure on a PII ground. The protocol on the disclosure of unused material in criminal cases and the Atorney General's guidelines both issued in 2013 seem to address a certain extent some of these criticisms. However, it is a question of waiting to see the concrete effects of such instruments on the way the disclosure process is carried out.

Finally, as correctly highlighted by the 2011 review, it is submitted that the disclosure scheme would benefit in terms of clarity and effectiveness from the consolidation of the multitude of guidance in the form of rules, codes, protocols, manuals and guidelines which underpin the operation of the CPIA as amended by the CJA.

199 Prof. Michael Zander, dissenting member of the Runciman Royal commission, in *The Review of the Criminal Courts in England and Wales* ("the Auld Report"), 2001, para 150.

II. Disclosure of information in the Italian criminal law system

Introduction

> "There are two ways to conceive the criminal process, standing on opposite sides. On one side, the one that conceives the criminal process as the instrument for ascertaining the historical truth of the facts; on the other side, the one that conceives the process as a system to solve a controversy between two parties, as a competition where the winner is the party who is more capable, more persuasive, more brilliant. . . .The essential problem lies just here: what type of process do we want? That of the continental tradition, or that of common-law? The difference is abyssal, because if I choose the second option truth does not matter anymore." [1]

This section focuses on the analysis and discussion of the main provisions regulating the disclosure of information (or the "discovery" process as it is referred to by Italian scholars) in the Italian criminal justice procedure.

On October 24, 1988, the Italian Parliament adopted a new code of criminal procedure (*hereinafter* CPP) that entered into force a year later. The adoption of the new code marked a major shift in Italy's criminal law system from a mainly inquisitorial criminal procedure to a procedure inspired by adversarial principles.[2] The code replaced the 1930 code of criminal procedure, which was influenced by the French tradition. Over the past twenty years following its enactment, the 1988 code of criminal procedure has been substantially amended on several occasions. The aim of these shifts was to reconstruct the Italian criminal procedure in an adversarial fashion and to adopt a more efficient procedure in order to deal with the significant backlog in the system.[3]

In the beginning of the 1990's the Constitutional Court handed down several judgments that have eroded the adversarial structure of the newly enacted reforms.[4] The quoted interpretation of the civil/common law clash, given by a respected judge of the Court of Cassation, is self-explanatory in reflecting the Italian judiciary's lean towards an inquisitorial criminal law system and therefore its difficulty in adjusting to a different conception of the criminal justice proceedings.

In 1999, the Parliament responded to the judiciary's offensive by undertaking constitutional reform. Constitutional law n. 2/1999 added five new sections to article 111 of the Constitution conferring constitutional status to the adversarial principles contained in the original version of the 1988 code of criminal procedure.

The new characterisation of the criminal law system had important bearings on the regulation of the disclosure of information to the suspect/accused in criminal

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1 Davigo P., *Sete di Giustizia e Sepolcri Imbiancati*, Micromega II, 209 1999.

2 See Law n. 81, 16 February 1987, article 2, paragraph 1.

3 Grande E., *Italian Criminal Justice: Borrowing and Resistance*, American Journal of Comparative Law, Vol. 48, 2000, p. 227.

4 The Constitutional Court is a judicial body composed of 15 judges one-third appointed by the President of the Republic, one-third elected by Parliament, and one-third elected by the ordinary and administrative supreme courts. The most important function of the Court, according to article 134 of the Constitution is to rule on controversies or disputes "regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and the Regions".

justice proceedings.
In order to assist the reader in grasping the main elements of the structure of the criminal system in which the disclosure of information operates as well as to appreciate the changes that have taken place with the adoption of the new code, this section provides a brief description of the main features of the 1930 and 1988 codes of criminal procedure. This includes an overview of the main developments concerning the 1988 code of criminal procedure which have occurred since its adoption, the pre-trial and trial phases of the current criminal proceedings, the role of the prosecutor and the constitutional fair trial reform.

Against the results of this analysis, the main provisions regulating the discovery process during the preliminary investigation and the pre-trial stage will be investigated. In the second part of this section, their effectiveness and compliance with the provisions of the Italian Constitution regarding a fair trial as inspired by the European Convention on Human Rights will be assessed. Finally, attention will be paid to the regulation of the defence's investigations envisaged by the code in connection to disclosure and some conclusions will be drawn.

1. The 1930 criminal procedure code

The so-called *Rocco* code of criminal procedure was enacted in 1930.[5] It embodied the main characteristics of the codes of 1865 and 1913 and was inspired by the French inquisitorial legal tradition. Under the *Rocco* code, the criminal procedure envisaged two important stages; the investigative stage (*investigazione*) and the public trial (*dibattimento*). Unlike the current system, the findings made at the first stage played a predominant role during the trial.

The protagonist of the investigation stage was the investigating or "instruction" judge (*giudice istruttore*) who enjoyed extensive powers. The investigating judge conducted the investigations impartially with the aim of ascertaining the truth. He was in charge of gathering and collecting all the evidence both against and in favour of the accused. This included hearing witnesses, ordering arrests and searches as well as the summoning and questioning the accused.

Investigations were mainly secret and in the original version of the code, the accused was not allowed to take part in any of the investigative activities. This situation improved slightly following the intervention by the Constitutional Court, which handed down several judgments that granted the accused the right to participate in some pre-trial activities.[6] All the evidence collected would be retained and recorded in the investigative dossier. At the end of the investigative stage, the *giudice istruttore*, based on the evidence gathered, decided whether to acquit the accused or to formally charge him.
The second stage was the public trial which was conducted before the trial judge.

5 The code owes its name to the Minister of Justice at the time.
6 Corte Costituzionale sentenze n. 190/1970, n. 63/1972, n. 64/1972. These decisions allowed the accused defence lawyer to challenge and contradict the evidence gathered.

Although in this phase the evidence was submitted in the presence of the defence who was granted the right to challenge it and to offer proof to the contrary, the defendant (and the prosecutor) could not cross-examine the witnesses directly. Both parties had to pose their questions through the trial judge who was fully aware of the nature of the case well in advance of its commencement thanks to the investigative dossier delivered to him. In addition, the conception of the investigative judge as an impartial fact finder conferred, in the eyes of the trial judge, a considerable weight to the evidence gathered and recorded in the dossier. The latter was therefore in a position to analyse the evidence collected, often with no intervention from the defence, and form his own opinion before the beginning of the trial.

The powers of the defence were limited and their effective deployment at trial was frustrated. The prosecutor's witness statements that were collected during the investigations could be admitted as evidence even if the witnesses were not present in court and written summaries of the evidence gathered during the investigations could be received at trial limiting the accused's right to challenge the evidence against him and to confront the prosecution's witnesses.[7] In practice, the public trial was often a repetition and confirmation of the investigative stage. The investigative dossier was the crucial element determining the outcome of the public trial and the accused could also be convicted based solely on the evidence gathered in secret during the investigation.

As far as the disclosure of evidence is concerned, the previous criminal law system was characterised by the powers of the investigating judge. The criminal justice system regarded him as an impartial organ and granted him the right to investigate with no obligation to inform the person who was being investigated. The system believed that the rights of the accused were safeguarded by the *super partes* nature of the investigating judge. The latter had to be placed in the position to carry out the investigations in the most efficient and effective way in the interest of ascertaining the truth which was also in the interest of the suspect. "Truth necessitated unlimited freedom of search".[8] This consideration left no room for disclosure obligations during the investigations.

2. The 1988 Code of Criminal Procedure

The new code of criminal procedure, enacted in 1988, marked a significant departure from the deeply rooted inquisitorial legal tradition that had characterised the three former codes of criminal procedure dated 1865, 1913 and 1930, to a criminal procedure moving towards the implementation of accusatorial principles. Article 2 of the law n. 81/1987, with which parliament delegated the preparation of a new code of criminal procedure to the government, stated that "the code of criminal procedure shall apply the principles of the Constitution and

7 Grande, above n. 3 at pp. 227 – 243.
8 Panzavolta M., *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, North Carolina Journal of International commercial Regulation, Vol. 30, 2005, pp. 578-618.

conform to international conventions. It also must implement in the criminal trial the characteristics of the adversarial system".

It is important to delineate the main features of the new criminal procedure in order to identify the context in which disclosure obligations operate. This subsection provides an overview of the functioning of the criminal procedure from the investigations to the beginning and development of the trial. The analysis is tailored to the provisions regulating ordinary criminal proceedings although some of the characteristics described below, especially in relation to the investigations phase, are applicable to the trial alternatives introduced by the new code.[9]

The adversarial nature of the 1988 CPP is reflected, *inter alia*, by the role conferred to the prosecutor, the adversarial presentation of evidence at trial characterised by the principle of orality and immediacy and the attempted reduction of the judge's power to introduce evidence at trial.[10] Broadly speaking, the new code of criminal procedure is based on two main grounds; the separation between the function of the prosecution and the function of the judge in criminal proceedings and the individuation of two separate and independent phases: the pre-trial and the trial phase.[11]

The prosecutor, assisted by the police, conducts the investigation. In this phase, the changes implemented by the new code of criminal procedure are in stark contrast to the former system. The scope of the preliminary investigation is no longer about the finding of truth as it was under the *Rocco* code. Article 326 of the CPP (headed "purposes of the preliminary investigations"- *finalitá delle indagini preliminari*), states that the aim of the preliminary investigations is the completion, by the public prosecutor and the police, of the investigations necessary to determine whether or not to begin prosecution.

The CPP presents a clear distinction between the investigative and the judicial functions in the preliminary investigation stage (*indagini preliminari*). The former is assigned to the prosecution and the latter to the judge for the preliminary investigation (*giudice per le indagini preliminary* or GIP).[12] The figure of the investigating judge (*giudice istruttore*) clearly inspired by the inquisitorial tradition of French origin, which combined both functions, was abolished.

Interestingly, the lawmakers, while embracing an accusatorial model were not inclined to relinquish the inquisitorial principle of the obligatory nature of the

9 The code of criminal procedure envisages several alternative procedures. The *giudizio direttissimo* and *giudizio abbreviato* enables the preliminary hearing to be omitted and have an immediate trial, based on the strength of the evidence against the defendant. In order to avoid the trial the code envisages three different procedures called "sentencing by the parties request" (*applicazione della pena su richiesta delle parti*), summary proceedings (*giudizio abbreviato*) and the proceedings by penal decree (*procedimento per decreto penale*). All these alternatives are tempting for the defendant as they involve a significant reduction of the sentence in exchange for the waiver of the right to trial.

10 See Illuminati G., *The Frustrated Turn to adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988),* Washington University Global studies Law Review, Vol. 4, 2005.

11 See Amodio E., *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, The American Journal of Comparative Law, Vol. 52, No. 2, 2004, pp. 489-500.

12 See Articles 326-328 of the CPP.

prosecution in favour of the discretion to prosecute. Consequently, once the public prosecutor learns of a *notitia criminis* (*notizia di reato*) or *motu proprio* collects information about a crime, he is compelled to register it in the crime reports register (*registro delle notizie di reato*) and to commence the preliminary investigations (*indagini preliminari*).[13]

The role of the preliminary investigation conferred to the judge is important in relation to the suspects' rights. The latter, in fact, in the worst-case scenario, may remain ignorant that investigations are being carried out on them until they are concluded. It is therefore the GIP's supervisory function over the prosecutor's activity that safeguards the suspect's rights. If the prosecutor considers it necessary to adopt measures that affect the individual freedom or the privacy of the suspect he cannot proceed *motu proprio* but needs to submit a request for preliminary investigations to the judge. Specifically, the GIP upon request of the prosecutor, may issue arrest warrants and permit wiretapping. Furthermore, the judge for the preliminary investigation ensures that the prosecutor acts within the time limits set by the code in relation to the length of the investigation.[14]

Once the investigation is concluded the prosecutor, based on the evidence collected, decides whether to file a formal charge against the suspect or to dismiss the case. Article 112 of the Italian Constitution mandates compulsory prosecution; consequently, the prosecution can only dismiss a case if it believes that the evidence gathered is too weak to lead to a conviction at a trial.[15] When the prosecutor decides to dismiss a case, the judge for the preliminary investigations reviews the decision and if he disagrees, can order the prosecutor to undertake further investigations or to charge the suspect.[16]

When the prosecutor considers that he has collected enough material through the investigations to obtain a conviction at a trial he formally requests that the suspect is committed to trial (*richiesta di rinvio a giudizio*).[17] This formal request marks the acquisition of the status of accused or defendant (*imputato*) by the suspect. Following the prosecution's request for a committal, a so-called preliminary hearing (*udienza preliminare*) takes place before the judge of the preliminary hearing (*giudice per l'udienza preliminare* or GUP). The latter cannot be the same person who acted as the judge for the preliminary investigation.[18] The accused is notified of the hearing and can participate putting forward his arguments against the prosecutor's request. The judge for the preliminary hearing analyses the investigation's dossier, hears the accused and assesses the viability of the prosecution's case in order to decide whether the case should be referred to trial. When the GUP cannot decide

13 See Articles 330 and 335 CPP.
14 Articles 405-407 CPP. The prosecutor is required to complete the investigation within six months (one year for certain crimes related to criminal organizations) from the registration of the notice of the crime in the registry of the notices of crimes. He can apply to the GIP for an extension of time. Such an extension may be granted for up to 18 months or, in exceptional cases, two years.
15 See Grande, above n. 3 at pp. 227 – 243.
16 Article 409 CPP.
17 Article 416 CPP.
18 Article 34 CPP.

on the basis of the information before him he can order further investigations be made by the prosecutor on the points he considers necessary.[19] The judge for the preliminary hearing can also introduce *motu proprio* the evidence he believes indispensable for a dismissal order.[20] The preliminary hearing is a filter between the investigation stage and the trial stage. It marks the end of the pre-trial stage. The decree committing the case for trial sets the date of the first trial hearing.

The trial judge must remain ignorant of the investigation stage to preserve his impartiality. This goal is pursued by the criminal procedure through the so-called "double dossier system" (*doppio fascicolo*); the investigation dossier and the trial dossier.[21] The trial judge is not allowed to see the investigation dossier, which remains available to the prosecutor and the defence to prepare for trial. The GUP and the parties draw up the trial dossier (*fascicolo per il dibattimento*) immediately after the case is referred for trial.[22] In theory, the trial dossier should be empty when it reaches the trial judge but in practice the code allows for certain exceptions. Consequently, the participation of the parties and the supervision of the GUP in the formation of a dossier whose content will be used at trial is an essential safeguard. The trial dossier may take from the investigative dossier, *inter alia*, the charging documents, the records of investigative activity that is objectively impossible to reproduce in court, the records of evidence admitted during the investigation through the confrontation of the parties before a judge,[23] the records concerning the *corpus delicti* and the records of prior convictions of the accused. If the parties agree, further documents collected during the investigations (both defence and prosecution documents) can be inserted in the trial dossier. In other words, the trial dossier should contain the bare minimum in order to limit the trial judge's knowledge of the investigation stage and preserve his neutrality. The sources of information contained in the prosecutor's dossier are transformed into evidence only through their production in court coherently with the adversarial principles of orality and immediacy that inspire the code.

According to article 468 CPP, at least seven days before the date set for the beginning of the trial, both parties must submit a list to the registry of the court with the names of the witnesses, experts and technical counsel they intend to call to testify indicating the circumstances in which their testimony will be given. This provision aims to avoid the introduction of surprise evidence during the trial envisaging a disclosure obligation whose violation is sanctioned with the inadmissibility of the oral evidence not previously disclosed.
The trial begins with the discussion of any preliminary matters and continues

19 See Article 421 *bis* CPP added by Law n. 479/1999
20 See Article 422 CPP amended by Law n. 479/1999.
21 See Illuminati, above n. 10 at p. 572.
22 Article 431 CPP.
23 Articles 392 – 404. The so-called *incidente probatorio* is the admission of evidence during the investigation stage. It takes place when there is a serious risk of deterioration or disappearances of potential evidence before trial. For example if there is an important witness who is in a life threatening condition (may be due to the perpetration of the crime prosecuted) his testimony may be heard immediately and admitted as evidence because of the risk that any further delay might cause the impossibility to hear the witness. This procedure takes place before the judge for the preliminary investigation in presence of the prosecutor and the suspect. Evidence so admitted can be used at trial only in relation to the accused whose attorneys participated in the hearing in which such evidence has been admitted.

with the opening statements from the prosecutor, the private parties (for instance the plaintiffs asking for damages)[24] and the defence. The prosecutor and then the defence present their evidence. Under article 190 CPP the trial judge is compelled to admit all the evidence presented by the parties unless inadmissible, forbidden by law or clearly superfluous or irrelevant. The defendant is not compelled to take the stand as was obliged under the *Rocco* code. No inference can be drawn by his choice and he cannot be held liable for perjury if it emerges that he lied to the court because he is not put under oath. The parties question the witnesses, experts and technical counsel through direct examination, cross-examination and re-examination. Article 507 CPP states that the trial judge, once the parties have presented their evidence, and when it is "absolutely necessary" can *sua sponte* decide to include more evidence. This provision clearly erodes the adversarial principles showing a certain reluctance to completely abandon the traditional judicial activism that had long characterised the criminal justice system.

Once all the evidence has been presented, the court hears the closing arguments of all the parties and decides on the case on both the merits and the sentencing giving its reasons for its findings in writing.

3.The figure of the prosecutor in the Italian criminal law system

The role that the code of criminal procedure expects the prosecutor to play in criminal proceedings is important in order to assess the repercussions on the disclosure of information that flow from the nature of this figure.

As previously mentioned, the new code of criminal procedure abolished the inquisitorial investigating judge (*giudice istruttore*) who was in charge of gathering all the evidence in an impartial way. The new code portrays the prosecutor as a party to the criminal proceedings in accordance with the adversarial legal tradition. This is confirmed by the function conferred to the preliminary investigations conducted by him, which do not pursue truth, as was previously the case, but are designed to enable the prosecutor to assess, based on the elements gathered, whether his case is likely to overcome the judicial scrutiny and reach trial.[25]

The provision of article 358 CPP justifies the interpretation that the prosecutor is still under the duty to safeguard the interests of the suspect and conduct an impartial search for the truth. This provision goes as far as stating that "the prosecutor completes every activity necessary under article 326 CPP and also assesses the facts and circumstances favouring the person under investigation". Nevertheless, as underlined by leading scholars, the prosecutor in the course of the preliminary investigations collects material favourable to the accused in order to test the strength of his case and avoid defending a weak case before a judge.[26] Consequently,

24 Grande, above n. 3 at pp. 227 – 243.
25 See Article 326 CPP.
26 Cordero F., *Procedura Penale* (8th Edition), 2008. Cordero states that if the prosecutor disregards [evidence favourable to the suspect], looking just in one direction, he risks a failure at trial or even before at the preliminary hearing; that the prosecutor must also consider the suspect's side is a matter of elementary caution, it is not a matter of inquisitorial opportunity.

it is in the interest of the prosecutor to assess all the elements available to him, which does not equate to carrying out investigations in the interest of the suspect in an impartial fashion as it was in the previous code.

On the other hand, despite the provisions of the criminal procedure code and their adversarial connotation, it is evident that the Italian criminal law system has not relinquished all the inquisitorial characteristics of the role of the prosecutor. The cultural factor in the conception of this delicate figure still plays a role in the current system. The prosecutor, in fact, maintains his predominant, and sometimes monopolistic, role in the preliminary investigation. That a suspect might not know they are being investigated until the completion of the process is tolerated because of the prosecution is still seen as being fully impartial as it was in the previous system. This is understandable if we consider that, as far as its professional collocation is concerned, the prosecutors continue to belong to the same judicial body to which preliminary investigation judges, preliminary hearing judges and trial judges belong. They are all appointed through the same national competition and they can, upon request, move back and forth from one position to another with no formal restriction.[27] In other words, they are colleagues belonging to the same professional group but exercising different functions within criminal justice proceedings.

Having such a strong structural, cultural and professional bond between the *super partes* organ called to adjudicate the trial and the prosecutor, who is a party to that same trial, appears inconsistent with the adversarial model. The lack of separation between the prosecuting and adjudicating function within the judiciary has been subject to criticism and many have advocated a reform of the system. This peculiar connotation of the prosecution has an impact on the defence's rights in relation to disclosure as is discussed further in this chapter.

4. The judiciary reaction to the 1988 CPP and the Constitutional reform

An organ transplant is a complicated operation with the risk that the human body rejects the new organ. Similarly, the transplant of important elements of a criminal procedure significantly based on the adversarial legal culture in a deeply rooted inquisitorial legal environment is an operation that can be expected to encounter some resistance. The enactment of a new code is not sufficient *per se* to consider the operation successful if those who are called to apply the core principles of the reform do not share them.

In Italy, the judiciary was not involved in the preparation of the reform and it was obliged to give up most of the judicial power it enjoyed under the previous long-lasting criminal procedure.[28] The idea that the truth would emerge from the parties' initiatives clashed with the judges' conception of their role as truth seekers.

27 Grande, above n. 3 at p. 6.
28 See Illuminati, above n. 10.

In the aftermath of the entry into force of the 1988 CPP, the application of the new criminal procedure in courtrooms proved problematic. In many cases the judges believed that several provisions of the code conflicted with the Constitution and challenged them before the Constitutional Court. In the first few years after the entry into force of the new criminal procedure code, the Constitutional Court received more applications challenging the provisions of the CPP than it had received in relation to the *Rocco* code in the 40 years since the enactment of the Italian Constitution in 1948.[29]

Between January and June 1992, the Constitutional Court handed down three judgments that eroded the foundation of the adversarial principles of orality and immediacy in relation to the acquisition of the evidence at trial.[30] These decisions had the effect of broadening the material in the investigative dossier that could be transferred to the trial dossier, attacking the clear-cut separation between the two phases that laid the foundation of the new code. In its judgments the Court also recalled the primary duty of the judge as a truth seeker forbidding any limitation to that function. Any information available in a case should be used at trial regardless of how it was collected. In other words, the Court restored the principle of "no dispersion of the evidence" over the principles of orality and immediacy.[31] Only few years had been necessary to show that the criminal procedure introduced by the 1988 CPP could not resist the "counter offensive" from the judiciary that, shielded by the Constitution, eroded its adversarial nature.

The parliament reacted vigorously by tackling the problem at its root and undertook a constitutional reform that was named the "fair trial reform" (*riforma del giusto processo*).[32] Interestingly, the constitutional reform was embraced by both left and right wing parties and quickly approved showing a common understanding of the need to a better protection to be afforded to the defendants. Constitutional Law n. 2 dated 23 November 1999, amended article 111 of the Constitution through the addition of five more paragraphs that read as follow:

"Justice must be administered by fair trials defined by law.

Trials are based on equal confrontation of the parties (*contraddittorio tra le parti*) before an independent and impartial judge. The law has to define reasonable time limits for the proceedings.

In the criminal trial the law guarantees that the person accused of a crime be confidentially informed as soon as possible of the nature and the reasons of the charges against him; that the accused has enough time and viable conditions to prepare his defence; that the

29 See Illuminati, above n. 10..

30 Corte Costituzionale, sentenze n. 24/1992, n. 245/1992 and n. 255/1992. The Court stated that the prohibition of the admission at trial of hearsay by police officers violated the constitutional right to equality, as it did not apply to witnesses. Furthermore, it allowed, in the defendant's trial, the use of out of court statements of an accomplice, tried separately, who does not appear in court or appears and remains silent. Finally, the Constitutional Court stated that the provision of the code that forbade the use of prior statements recalled by the parties during cross-examination violated the Constitution.

31 Following these judgements, in August 1992, the Parliament passed Law 397 which increased the exceptions to the rule that only evidence produced at trial was admissible. See Law 397/1992 in Gazzetta Ufficiale n. 185, 7 August 1992.

32 Article 138 of the Constitution requires a qualified majority in both houses of the Parliament that have to approve the amendments twice in a period of not less than three months.

accused has the possibility to examine or to have examined the witnesses against him, to have favourable witnesses summoned for being examined at trial on equal standing with the prosecution, as well as any other evidence in his favor; that the accused be assisted by a translator in the event he does not understand or speak the language used in the trial.

The criminal trial is regulated by the principle that evidence may only be established according to the confrontation between parties (*principio del contraddittorio nella formazione della prova*). The accused cannot be proved guilty upon declarations of anybody who willingly avoided to be examined by the accused or by his lawyer.

The law defines in which cases evidence may be established without confrontation between the parties, either by consent of the defendants or because of an objective impossibility or of a proved unlawful conduct…."

Article 111 of the Constitution as amended reflects the core elements of article 6 of the European Convention on Human Rights and Individual Freedoms. Among others, the defendant is granted the constitutional right to be informed about the charges against him as soon as possible, to offer counter evidence and to confront and cross-examine witnesses. Above all the Constitution now clearly states the rule that evidence must be established at trial through the confrontation of the parties and no guilty verdict can be handed down based on the out of court statements of witnesses who have not been cross examined by the defence.
The next step was the adjustment of the CPP to the new draft of article 111 of the Constitution. In 2001, parliament passed law n. 63 that modified many of the code of criminal procedure's articles.[33] In particular those articles found unconstitutional by the Constitutional Court in 1992 that regulated the way in which evidence at trial was to be acquired were targeted.[34] In other words, the constitutional reform and the following statutory provisions that implemented it brought the criminal procedure closer to the original adversarial characterisation envisaged by the drafters in 1988. The restored adversarial basis of the criminal procedure was now backed by the Constitution and that made the difference when the Constitutional Court was once again called to scrutinise the constitutionality of the recently amended code provisions. Between 2000 and 2002, the Constitutional Court upheld the constitutionality of the prohibition of hearsay for police officers rendering their testimony at trial and the constitutionality of limiting the use of prior statements solely in order to attack the credibility of a witness. The separation between the investigation stage and the trial in relation to the admission of evidence had been granted constitutional status.

A peculiarity of article 111 paragraph 3 of the Italian Constitution lies in the confidentiality of the information to be given to the accused. This characteristic is not included in the international provisions. Finally, the Italian version did not adopt any reference to the "detailed" and "understandable" requirements of the information as conceived by the ECtHR and the ICCPR.

33 See Pizzi W. and Montagna M., *The Battle to Establish an Adversarial Trial System in Italy*, Michigan journal of International Law, Vol. 25, 2004.

34 For example, Article 195 CPP which the Constitutional Court had found unconstitutional now states, matching the 1988 version, that out of court statements gathered during preliminary investigations cannot be the objects of the police officer's testimony at trial.

5. The "discovery" scheme in the preliminary investigation stage

5.1 Introduction

Having described the structure of the criminal proceedings as envisaged by the 1988 criminal procedure code and the fair trial constitutional reform that conferred constitutional status to several rights of the accused, this subsection will analyse the provisions of the CPP that regulate the disclosure scheme during the preliminary investigations.

The Italian criminal justice proceedings are based on a clear-cut division between the investigative stage and the trial stage. It is therefore essential that, in accordance to the European Convention on Human Rights and the Italian Constitution, the suspect's right to "be confidentially informed as soon as possible of the nature and the reasons of the allegations against him" is safeguarded from the beginning of the investigations. On the other hand, this right must be balanced with the public interest in the effectiveness of the investigations into a crime that might require a variable degree of secrecy.

Article 329 CPP, in fact, states that the acts performed by the prosecutor during the investigations shall be confidential and the suspect must be informed in any case no later than the closing of the preliminary investigations.

Many questions arise in relation to such a delicate topic. How does the system enable a person to know that he is being investigated? Are the provisions in the code, which set up the disclosure scheme in relation to the preliminary investigations, consistent with the *ratio* of article 111 of the Constitution, and the ECtHR fair trial principles? What are the powers of the defence once it is known that investigations are being conducted? An analysis of the text of the relevant provisions, their functioning and their effectiveness can provide the answers to these questions.

5.2 Article 335 CPP: Record of crime reports (Registro delle notizie di reato)

In the Italian judicial system, criminal proceedings begin when the prosecutor receives notice of a crime (*notizia di reato*) or when he, *motu proprio*, collects information about a crime and registers it in the record of crime reports.[35] A crime report (or crime notice) has been defined as the embryo of hypothetical criminal proceedings.[36] In sum, it can be defined as an information, received by the police or the prosecutor, on a fact/conduct that may be described as a crime.[37] The jurisprudence has stressed the necessity of the identification of the person who is giving the relevant information therefore, anonymous information does not

35 See Articles 330 and 335 CPP.
36 Zappulla, *Le Indagini per la Formazione della Notitia Criminis: il Caso della Perquisizione Seguita dal Sequestro*, Cassazione Penale, 1996, 1099.
37 Santoriello C., *La Definizione della Notizia di Reato*, 2001, www.deaprofessionale.it. On the elements of a crime report see Santoriello C., *Pseudo-notizie di reato e poteri del pubblico ministero*, Giurisprudenza Italiana 2001, 8-9.

qualify as *notitia criminis* although they might spur the prosecutor into starting investigations *motu proprio*.

Article 335 paragraphs 3 and 3(b) regulate the right of a person to be informed that the prosecutor has recorded a crime report allegedly committed by him and that consequently an investigation is being carried out. These provisions have been amended (paragraph 3(b) was added) by law n. 332 dated 8 August 1995.

It is worth stressing that, although the registration by the prosecutor of a *notitia criminis* might seem a mechanical and rather simple operation, the poor performance of such operation can affect the suspect's rights. To enter in the record a notice of a crime there must be a real notice; the mere conjecture, suspicion or assumption of a crime does not constitute a notice of a crime. Nonetheless the prosecutor can and should investigate what he believes could lead to a real *notitia criminis*.

In the *Rocco* code, article 335 prohibited the communication of the registration of a notice of a crime to the suspect until he was officially charged therefore at the end of the investigation. The current version envisages the opposite rule and the registrations are communicated to the suspect (*indagato*), to his lawyer and to the victim of the crime, but only upon their request. The provision does not apply to certain crimes such as, *inter alia,* homicide or crimes related to criminal organisations for which there is no duty to communicate.[38] Paragraph 3(b) states that the prosecutor while deciding upon the suspect's request (or his lawyers or the victim) and when the exigencies of the investigation so require, may dispose that the registration of the notice of crime remains secret for a period which cannot exceed three months (not extendable). The prosecutor's assessment in this regard is not subject to any judicial scrutiny.

It is also noted that in practice it is difficult to expect that a person would ask all the prosecution offices in Italy whether there is any crime report registered that concerns him unless he is aware of the criminal implications of certain acts perpetrated by him.

Moreover, it is remarked that although the prosecutor is compelled to answer, there is no prescribed time limit within which the prosecution must answer and therefore no sanctions can be imposed in cases of delayed answer, leaving once again the functioning of article 335 CPP to the prosecution's discretion.
A timely response may still leave the suspect in doubt given that article 110 *bis* of the disposition for the implementation of the criminal procedure code lay down the wording of the two possible answers in details. The prosecutor can respond, "Yes, there are the following registrations that can be communicated" or "No there are no registrations that can be communicated". The second answer, through its

[38] Article 335 CPP refers to crimes listed in Article 407 paragraph 2(a) as an exception to the rule of the communication. In relation to these crimes, the secrecy is predominant also in relation to the request by the prosecution of an extension of the time for the preliminary investigations to the GIP.

choice of words, is ambiguous. Indeed, it can mean that there are no registrations of crimes relating to the suspect but it could also mean that there are registrations that cannot be communicated as the prosecutor has kept them secret or that the investigations concern a crime for which there is no duty to communicate the registration to the suspect.[39] In addition, it can also mean that the request has been addressed to the office of the prosecutor outside of the jurisdiction and therefore not competent to investigate that crime.

There are three main records in each office of prosecution (*Procura della Repubblica*) in Italy. One contains all the *notitiae criminis* for which there is a suspect; one contains all the notices of crimes without suspects and a third one containing the conjecture/suspicion/assumption that does not yet qualify as a *notitia criminis* (*non notizie*).

Investigations can be carried out by the prosecutor in relation to conjecture/suspicion/assumption without any duty to communicate the registration to the suspect who requests it as only the registration in mod. 21 and 44 triggers the provision of article 335 CPP. Moreover, as long as there is a registration in mod 45 the calculation of the terms of the preliminary investigations does not begin. The prosecutor might delay the transfer to the two other registries avoiding interferences in his investigations and circumventing the already limited effectiveness of article 335 CPP.[40]

Concluding, the amendment of article 335, whose aim was, in essence, to enable a person to be informed that he is being investigated in order to "defend himself by proving" (*difendere provando*), appears ineffective. Rather than providing a suspect's rights it is merely a possibility that depends above all on the prosecution's discretion. This structure conflicts with the adversarial basis that the criminal procedure should have embraced and with the suspect's constitutional rights at this stage.

5.3 Article 369 CPP: Notice of investigation (Informazione di garanzia)

The provision of article 369 CPP (also amended by law n. 332/1995) regulates the duty of the prosecutor to inform the person who is being investigated about the provisions of law that have been allegedly violated, the date and place in which this violation would have taken place and to inform him of his right to appoint a lawyer. In compliance with the Constitution, this communication is carried out through recorded mail so as to guarantee its confidentiality.
The effectiveness of this provision is essential for the efficient exercise of the defence rights at the preliminary investigation stage and especially of the right of the suspect "to defend himself by proving" (*difendere provando*), namely by collecting evidence to prove his innocence and avoid trial. On the other hand, this

39 Crimes listed in Article 407 para. 2(a).
40 See Maddalena M., *Registro delle Notizie di Reato: I Problemi del Dopo Riforma I) Il Punto di Vista di un Magistrato*, Diritto Penale e Processo, 1996, 4, 487.

interest must be weighed against the necessity of safeguarding the investigative activity of the prosecutor that might be jeopardised by the suspects' knowledge of the on-going investigation. Therefore, the question is how does the code strike the right balance between these conflicting interests?

The mechanism envisaged by the code subordinates to the prosecutor's investigative activity the communication to the suspect. Specifically, article 369 CPP states that only when the prosecutor intends to carry out an investigative activity to which the defence lawyer has the right to assist (*atto garantito*), is he compelled to communicate the information to the suspect as mentioned above. Therefore, the prosecutor triggers such duty through his conduct during the preliminary investigation. The broad discretion that the system grants to the prosecutor is evident. The latter, in fact, can decide to postpone a specific investigative activity, in which the defence lawyer would have the right to participate, delaying the moment at which the suspect is informed of the ongoing investigations.

What are these investigative activities whose performance triggers the obligation to inform the suspect? Article 364 CPP outlines the interrogation, the inspection and the charge to which the suspect is called to answer. There are other investigative activities aimed at gathering information that, due to their nature, would be prejudiced by the previous communication to the suspect. Article 365 regulates the search and the arrest for which preventive information is not required although the defence lawyer is entitled to assist them and the records of such activities are made available to the parties at the office of the prosecutor within three days from their performance.

The provision of article 369 CPP rather than being characterised by the informative scope seems to be intended to enable the suspect to exercise his rights of defence in relation to a specific investigative activity carried out by the prosecutor. Indeed, once the suspect has been informed pursuant to article 369 CPP, the code does not envisage a further right to be informed if the prosecutor, in the course of the preliminary investigations, decides to describe the conduct differently in light of the material gathered. If the *ratio,* underlying article 369, is to inform the suspect, such an important change in the legal characterisation of the crime allegedly committed should be notified to him. In addition, the content of the information given to the suspect is limited to merely informing that the investigations are taking place, the activity that is about to be carried out (interrogation, arrest etc.) and the provisions of the law that have allegedly been violated, but it says nothing about the information gathered during the investigations. Moreover, article 369 CPP states that the victim of the crime must also be notified together with the suspect. These considerations corroborate the impression that the norm is crafted to enable the suspect to exercise his rights of defence in relation to a specific action undertaken by the prosecutor rather than being based on the *ratio* of informing the suspect of the essence and connotations of the alleged crimes under investigation and attributed to him. Consequently, the norm seems to fall short of implementing the ECtHR and the suspect's constitutional right to be informed of the nature and the reasons of the allegations made against him.

In relation to the timing of the communication, it should be noted that a proposal of reform that would fix the term at 60 days from the registration of the *notitia criminis* with the possibility of extension in cases of wiretapping or when the investigations so required was not accepted.

The notice of investigation should take the need for a more detailed and articulated description of content supplied to the suspect in relation to the allegations made against him so as to enable him to exercise his right to defend himself and prove his innocence. Moreover, the *informazione di garanzia* should be conceived and construed as an indispensable condition for the effectiveness of the suspect's right to be informed of the ongoing investigations protecting it from the prosecutor's discretion.[41]

The 1995 reform has reduced suspect's rights through the amendment of article 369 CPP trying to counterbalance it by envisaging the possibility that the registration of a *notitia criminis* is communicated to the suspect upon request (ex article 335 CPP). So under the current criminal procedure a person may not be aware of being suspected of the commission of a crime until the end of the preliminary investigations, preventing him from exercising the rights that the adversarial interpretation of the CPP grants him at such a delicate stage. There seems to be therefore, a contrast between the safeguards of the suspect's rights envisaged by the criminal system and their real effectiveness.

5.4 Article 415 bis CPP: Notice to the suspect of the conclusion of the preliminary investigations (Avviso all'indagato della conclusione delle indagini preliminari)

5.4.1 Introduction

Article 415 *bis* CPP states that before the expiry of the deadline for the conclusion of the preliminary investigations the prosecution, unless it is leaning towards the dismissal of the case, must notify the suspect and his lawyer of the conclusion of the preliminary investigations. The information contains, *inter alia*, a summary description of the facts underlying the proceedings, the rules of law allegedly violated and the *locus commissi delicti*.

This provision did not feature in the original version of the 1988 criminal procedure code but it was introduced by law n. 479 of 1999. Before the introduction of article 415 *bis* the prosecutor could ask the committal of the case without any duty to notify the suspect of the proceedings nor to interrogate him. Consequently, a person first discovered the criminal charges against him when summoned for the preliminary hearing. Due to the considerable lapse of time between the beginning of the preliminary investigation and the preliminary hearing, the suspect's effective possibility for gathering evidence favourable to him was significantly affected.

41 See Caraceni L., *Tutta da Rivedere l'Informazione di Garanzia,* Diritto Penale e processo, 1996, 5, 634.

Article 415 *bis,* in its second paragraph, shapes the prosecutor's obligation to disclose with regard to the documents and material gathered during the preliminary investigations that must be made available (at the office of the prosecutor) to the suspect and his lawyer for consultation with the possibility of making copies of them. The suspect must be informed of this pursuant to article 415 *bis*.

The informative function of the notice given to the suspect emerges in paragraph three of article 415 *bis*, which states that the suspect is informed that within twenty days from the notification he can file submissions, exhibits, documents as well as present the material gathered through the defence investigations carried out. The suspect can also ask the prosecutor to undertake further investigations on his behalf and he can request that he be interrogated. While the prosecutor is not obliged to meet the suspect's request in relation to further investigations he is compelled to interrogate him if the suspect so requests.

When the prosecution decides to undertake further investigation, in accordance with the suspect's request, it must to complete them within thirty days from the request. The term can be extended by the judge only once for the preliminary investigation for no longer than sixty days.

Article 415 *bis* may mark the first moment where the suspect is officially informed of the existence of criminal proceedings against him. The code of criminal procedure identifies this moment as the "point of no-return" beyond which it is not acceptable that a suspect is unaware of the existence of criminal proceedings, of the material gathered during the preliminary investigations and cannot challenge the prosecutor. A person who, under investigation, may have been informed at a previous stage of the ongoing criminal proceedings under article 335 and 369 CPP but this is just a possibility. On the contrary, when the preliminary investigations are on the verge of completion and the prosecutor is determined to try the case the procedure guarantees that the suspect is informed, that the results of the investigations are revealed and made available to him so that he can challenge the prosecutor. The notice given to the suspect pursuant to article 415 *bis* is an instrument that triggers an informed and adequate defence activism.[42]

From the description of this provision a question arises: Does the scheme envisaged by article 415 *bis* put the suspect in the position to play a role in the prosecutor's decision of whether to ask for the dismissal of the case or to request its commitment to trial?

To answer this question some considerations must be made. As discussed, article 415 *bis* operates inbetween the conclusion of the preliminary investigations and the preliminary hearing. Therefore although based on the findings of the preliminary investigations, the prosecutor's decision request the committal has already been made, though there is still some room for the suspect to influence this determination. Whether this is a feasible possibility is a different issue.

42 Bonzano C., *Avviso di conclusione delle Indagini: L'Effettività della Discovery Garantisce il Sistema*, Diritto Penale e Processo, 2009, 10, 1281.

The suspect can ask (*rectius* has the right) to be heard by the prosecutor in order to give his version of the events as they occurred and he can do so in light of what the prosecutor has gathered in the preliminary investigations. The disclosure allows the suspect to be aware of what he is facing and to file submissions, tender documents and undertake investigations for the purpose of defence. These defence activities must be completed within the somewhat restrictive term of twenty days. It seems that the timing affects the effectiveness of the defence's potential influence on the prosecutor's decision. When a person is aware of criminal justice proceedings underway against him (through the information ex article 415 *bis*), the allocation of twenty days to form a case for the defence seems ineffective when compared to the time (not to mention the resources) available to the prosecutor for completing the preliminary investigation.

The lawmaker's decision to allow the prosecutor discretion over whether they begin investigations as requested by the defence appears debatable. The Constitutional Court has upheld the constitutionality of the absence of an obligation of the prosecutor to carry out the investigations requested by the defence.[43] Nonetheless, the rule lends itself to distorted implementation. In fact, in the context of a criminal law system, supposedly based on an adversarial model, it is incorrect for one of the parties to be granted discretionary power over the other party's request for investigation so to be able to affect its efficiency. It would be recommendable that a *super partes* organ (i.e. the judge for the preliminary investigation - GIP) decides over the defence's request for further investigation. Furthermore, when the prosecutor conducts the requested investigations the system expects him to inquire about elements favourable to the suspect in line with an inquisitorial approach rather than an adversarial one.

In this context, supported by the above arguments, it seems unlikely that a suspect could effectively challenge the prosecutor's decision.

5.4.2 The disclosure to the suspect

The disclosure scheme envisaged by article 415 *bis* must be analysed in the context of the above context. The disclosure of all the material gathered and collected by the prosecutor during the preliminary investigations is crucial for respecting the suspect's rights. The prosecutor's disclosure is the first moment at which a person under investigation is granted access to the prosecutor's dossier. In fact, once a suspect has been informed of the existence of criminal proceedings against him he has no right to inspect the files during the preliminary investigations except those related to investigations where the defence lawyer has the right to be present.

The full discovery of the results of the preliminary investigations is essential in order to allow the suspect's effective participation to the proceedings and give him the opportunity to make an informed decision on the possibility of opting

43 Corte Costituzionale, ordinanza n. 287/2003.

for alternatives to trial. The rights granted to him by article 415 *bis* would be prejudiced in their enforcement if the prosecutor selected the material to discover and withheld part of it. This prejudice could not be remedied in later stages of the trial. Rather, the suspect would exercise his rights of defence ex article 415 *bis* CPP on the basis of a partial discovery that would irreversibly shape his defence.

The completeness of the discovery in this phase of the criminal proceedings is also relevant for the judge for the preliminary hearing (GUP) who is called upon to decide on the prosecutor's request to commit the case for trial. The preliminary hearing, as described above, is conceived by the criminal procedure as functioning as a pre-assessment of the merits of the prosecutor's case. The judge is granted extensive power to request that the prosecutor undertake further investigations or to call evidence himself.[44] The GUP makes his determinations based on the prosecutor's dossier (and the submissions and documents that the defence may produce). Consequently, if the preliminary investigations' files are incomplete the GUP decision will not be an informed one.

The discovery can potentially benefit the prosecutor as the adversarial interaction with the accused and the elements adduced by him may lead to the prosecutor reconsidering the case (in relation to the request to commit the case for trial as well as in relation to the legal qualification of the facts). In other words, through the confrontation with the suspect the prosecutor avoids the risk of prosecuting a case that is unlikely to overcome judicial scrutiny.

The importance of the notification to the suspect pursuant to article 415 *bis* is reflected in the severe sanction envisaged in case of its omission by the prosecutor (or in case of disregard of the obligation to interrogate the suspect who has requested it) leading the nullity of the request to commit the case for trial. The proceedings are consequently regressed to a previous stage in order to ensure the correct notification.

In relation to disclosure, in the absence of the text of article 415 *bis*, there was debate concerning which sanction would be appropriate when the prosecutor withholds certain material from the suspect. The Court of Cassation's jurisprudence (*Corte di Cassazione*) on this issue states that if the prosecutor omits certain documents from the dossier, this conduct does not affect the validity of the prosecutor's request to commit the case for trial but it does entail a ban on using such material during the preliminary hearing or at trial.[45] It has been argued that this approach might affect the suspect's rights as much as the non-disclosure itself when the prosecutor has omitted material favourable to the suspect that will be declared no longer usable.[46] The nullity of the prosecutor's request to commit the case for trial is a remedy advocated by part of the doctrine. In fact, through the regression of the proceedings the incomplete disclosure of evidence can be remedied thereby

44 See Articles 421 *bis* and 422 CPP.
45 See *ex plurimis*, Cassazione Penale, sentenza n. 21593/2009.
46 See Bonzano, above n. 42.

safeguarding the suspect's right to full access to the material from the preliminary investigation.[47]

This consideration leads to a broader one regarding the way in which a legal system conceives the truth-seeking process in criminal justice proceedings and more specifically, it concerns the truth as the goal to be pursued in criminal trials. If the truth is intended to the ultimate goal whose discovery must be ensured and cannot be left at the disposal of the parties' procedural conduct, then it is not acceptable that material relevant to the truth-seeking process might be excluded from trial due to a mistake or even worse due to distorted conduct on the part of the prosecutor. For example, let us suppose that the prosecutor, for any reason, does not discover, pursuant to article 415 *bis,* a video portraying the suspect committing the alleged crime. This material could not be used in the trial affecting the conclusion emerging from it as a result of the prosecutor's conduct. Such consequence would be less of a problem in a system that contemplates the truth as emerging from the struggle between two parties in a more adversarial fashion.

6. The disclosure in the pre-trial stage

6.1 Introduction

At the end of the preliminary hearing if the GUP decides to uphold the prosecutor's request he issues a decree that orders the trial of the suspect (*decreto di rinvio a giudizio*). The decree sets the date for the beginning of the trial and the dossier for the trial (formed by the GUP with the assistance of the parties) is given to the competent court. The lapse of time between the issuance of the decree and the beginning of the trial is the pre-trial stage of the criminal proceedings (*pre-dibattimento*) in which the parties prepare for the trial. Pursuant to article 466 CPP, the criminal justice procedure grants the right to the parties and their lawyers to consult the trial dossier and to make a copy of the material included therein. Moreover, the code envisages further disclosure duties for the parties that intend to request the admission at trial of oral evidence. This disclosure obligation is regulated by article 468 CPP whose provisions are analysed below.

6.2 Article 468 CPP: Summoning witnesses, experts and technical counsel (Citazione di testimoni, periti e consulenti tecnici)

Article 468 CPP states that when the parties intend to request the admission of the testimony of witnesses, experts and technical counsel they must deposit in the Registry of the Court, at least seven days before the date set for the beginning of the trial, a list indicating the circumstances in which these witnesses will testify.

The *ratio* of this provision is to avoid the possibility of one party submitting

47 See Bonzano, above n. 42, and Campanelli S., *La Vexata Quaestio della Natura Giuridica delle Sanzioni ex Art. 415 bis CPP*, Diritto Penale e Processo, 2007, 5, 642.

surprise evidence in the trial without any previous warning for the other party. Article 468 CPP performs a function of discovery of the evidence (*rectius* evidence whose admission will be sought at trial) before the beginning of the trial.[48] From the analysis carried out so far it emerges that the disclosure that takes place in this segment of the proceedings is not the first disclosure of the prosecutor's material to the accused. In fact, through the provision of article 415 *bis* CPP, the latter is granted full knowledge of the elements of the prosecutor's case upon completion of the preliminary investigation and before the preliminary hearing. Nonetheless, the disclosure scheme regulated by article 468 CPP discloses to the accused a further element, namely the circumstances on which testimony will be given at trial.

Given that article 415 *bis* does not regulate any disclosure obligation for the defence (the defence has the ability and right to create its own dossier to be joined to that of the prosecutor's), the provision of article 468 CPP might be the first moment in which the prosecutor discovers the elements of the defence's case.[49] The disclosure mechanism regulated by article 468 assists the prosecutor in understanding the strategy followed by the defence rather than benefiting the defence.[50] It can be concluded that, unlike other disclosure duties analysed so far, the duty envisaged in article 468 is characterised by equal responsibility.[51]

The list the parties deposit in the Registry of the Court must indicate the circumstances that will be covered by the testimony of the witnesses, experts and technical counsel. By the term "circumstances" the code indicates a particular situation referable to a determined fact. Primary facts to be proven in the context of a criminal trial are those underlying the indictment and, from the perspective of the defence, those able to poke holes in the prosecution's theory. Secondary facts are those that if proven might generate inferences over the existence of a primary fact.[52] The circumstances indicated in the list circumscribe the issues that a certain testimony may cover. Nonetheless, questions on circumstances not listed ex article 468 are admissible at trial as long as they are linked directly or indirectly to those mentioned in the list. In other words, the indication of the circumstances in the list aims to give a picture of the intended effect that such testimony should produce within the defence's or prosecutor's strategies but it is not intended to limit the questioning of a witness. During the examination of a witness, circumstances which are logically linked to those listed emerge and therefore need to be explored without constituting surprise evidence for any of the parties.

Although this is not explicitly required by article 468 CPP, it seems arguable that the list should also contain the names of the witnesses, experts and technical counsel that each party intends to call, this being an important element of the enforcement of the other parties right to defend themselves by questioning, allowing them to

48 See *ex plurimis*, Cordero F., *Commento all'art. 468, in codice di Procedura Penale Commentato*, Torino, 1992, p. 574.
49 See Grilli L., *Il Dibattimento Penale*, Padova, 2003, p. 44.
50 Iacoviello F.M., *Processo di Parti e Poteri Probatori del Giudice*, Cassazione Penale, 1993, p. 291.
51 Iafisco L., *Gli atti Preliminari al Dibattimento Penale di Primo Grado*, Giappichelli Editore, Torino, 2009, p. 55.
52 Ibid. at 59.

prepare an informed cross-examination. The latter, in fact, is built up differently in relation to the subjective characteristics of the person under examination.[53]

On several occasions, the Court of Cassation has embraced a broad interpretation of this requirement. For instance, it allowed the alternative indication of witnesses in the list as long as their testimony covers circumstances which are the same as those indicated.[54] Furthermore, the *Corte di Cassazione* recognised the admissibility of the testimony of a person informed on the facts relevant to the trial in substitution of a witness indicated in the list ex article 468 CPP.[55] Finally, the Court of Cassation held that the prosecutor's failure to provide the name of a witness in the list, ex article 468, neither violates the defence's rights nor constitutes the (prohibited) presentation of surprise witnesses as long as the name is easily available and knowable by the accused in light of the qualification of the witness offered in the list.[56] In this particular case, concerning the failure to pay social security contributions, the Court considered the testimonies of witnesses whose names had not been mentioned on the list admissible (ex article 468), as they were described as inspectors of the National Institute of Social Security.

If the jurisprudence described above is taken too far it may defeat the purpose of article 468 CPP. Specifically, testing the oral evidence through the assessment of the reliability of the witness based on his personality in "moral, cultural, professional and social aspects" might be impossible if the other parties do not know in advance the name of the witness they have to cross-examine.[57] The same argument applies to cases where the names of the witnesses indicated in the list are changed shortly before their testimony, frustrating the defence's preparation for cross-examination.

The pre-trial disclosure regulated by article 468 also has the important function of enabling the other parties to request the admission of "evidence to the contrary" (witnesses, experts and technical counsel) in relation to the circumstances indicated in the lists deposited.[58]

Article 468 CPP foresees the inadmissibility of testimonies not included in the list or included in a list that breached the seven day deadline. Furthermore, testimony can be declared inadmissible, also *ex officio*, by the judge when the list does not mention (or only vaguely mentions), the circumstances that will be covered by the testimony, or does not indicate the names of the witnesses (with the exception discussed above). The sanction does not affect the list but rather the subsequent request for the admission of evidence that takes place during the trial.[59]

53 See Paulesu P.P., *Giudice e Parti nella "Dialettica" della Prova Testimoniale*, Torino, 2002, p. 63.

54 See Cassazione Penale, Sentenza n. 4329/2000. The prosecutor in this case had listed the names of two police officers asking the admission of one of the two testimonies, which covered the same circumstances.

55 See Cassazione Penale, Sentenza n. 4936/2004.

56 See Cassazione Penale, Sentenza n. 38501/2007.

57 Dominioni O., *La Valutazione delle Dichiarazioni dei Pentiti*, Rivista di diritto Processuale, 1986, p. 748.

58 Article 468, paragraph 4, CPP. The time limit of seven days before the beginning of the trial clearly does not apply to the request of the admission of the evidence to the contrary whose individuation and selection can only take place once the other parties have delivered their list. A different solution would lend itself to distorted application considering that each party could wait until the last possible moment to file its list so as to prejudice the chances of the other parties asking for the admission of evidence to the contrary.

59 Article 493 CPP.

The lawmakers have limited the applicability of the disclosure obligation regulated by article 468 CPP to the testimony of witnesses, experts and technical counsel.[60]The disclosure scheme is subject to certain exceptions in relation to oral evidence.

The examination of the accused is also admissible without previous mention in the list ex article 468 CPP. This is obvious considering that it is a free choice of the accused that can also be influenced by the way in which the trial unfolds. This freedom of choice must be balanced with the other party's need to have adequate time to prepare the cross-examination in case the accused decides to testify and with their right to have evidence to the contrary admitted.

Another exception occurs when, during the examination of a witness indicated in the list ex article 468 CPP, it emerges that the witness' knowledge of the testimony is not direct but indirect In other words, he has learned about it through a third person, having a knowledge *de relato* and not first hand. In this case, the testimony of the direct source of knowledge is admissible despite not being previously named on the list.

In relation to written evidence, the disclosure ex article 468 CPP does not apply. The *ratio* underlying this choice lies in the nature of such evidence in that, unlike oral evidence, is preconceived and does not come into being at the trial making the need to safeguard the other parties from surprise evidence less important. It also reflects the basis of the criminal procedure as an adversarial model where oral evidence is predominant. In the current system, the disclosure of the documental evidence takes place at trial when the parties tender the documents asking the judge for their admission and the other parties can analyse each document whose admission is also sought.[61]

The Constitutional Court has upheld the constitutionality of the differentiation in the disclosure regime in relation to oral and written evidence.[62] It underlined that the procedure safeguards each party's right to analyse the written evidence admitted through the provision of article 477 CPP that allows the judge, in cases of absolute necessity, to suspend the trial. However, to link the effectiveness of the discovery of written evidence to the judge's discretion to suspend the trial and to determine its length (maximum of ten days according to article 477 CPP) is a lesser safeguard for the parties than the automatic disclosure duty envisaged in article 468 CPP. The code seems to portray the written evidence as rather comfortable to be adversed in the course of the trial through the concession of an *ad hoc* term.[63]

Asides from the above described exceptions to the rule, even when one of the parties has incurred in the inadmissibility of a testimony, the criminal procedure code envisages a safety net of having the evidence admitted. Article 493 CPP, second

60 The provision of Article 468 CPP applies also to persons accused in a connected trial according to Article 210 CPP.
61 Article 495 CPP.
62 Corte Costituzionale, sentenza n. 284/1994.
63 See Lopez R., *Termini di Ammissione della Prova Documentale,* Diritto Penale e Processo, 2009, 8, 1037.

paragraph, states that the acquisition of evidence not listed ex article 468 CPP is permitted when the party that is requesting its admission, proves that it was unable to disclose evidence in advance. The rather lenient wording of this provision, especially in relation to the threshold of what constitutes late disclosure, leaves ample room for the admission of oral evidence not previously discovered with the other parties. In this case the other party has the right to request the suspension of the trial.[64]

The code offers another possibility for overcoming the pre-trial discovery restriction ex article 468 CPP. The judicial activism in relation to the admission of evidence, in fact, allows the trial judge (pursuant article 506 CPP) to direct the parties toward new or broader evidence that he considers necessary for the trial. He may also question the witnesses, experts and technical counsel directly on any subject he deems necessary for fully understanding the relevant facts. Furthermore, once the admission of the evidence tendered by the parties has been completed the trial judge can, when he considers this absolutely necessary, order the admission of new evidence *motu proprio*, pursuant article 507 CPP.

In relation to article 507 CPP, it is worth mentioning the jurisprudence's decisive contribution to its interpretation in relation to the disclosure obligation ex article 468 CPP. In 1992 the *Corte di Cassazione,* sitting as a full court, stated that the evidence that the trial judge can admit *motu proprio* includes the evidence that for any reason has not been disclosed by the parties through article 468 CPP. Moreover, the judge can also do so when requested by the same party that did not disclose the evidence within the time limits set.[65] The Constitutional Court embraced this interpretation and added that the power given to the judge ex article 507 CPP is supplementary to the power of the parties to introduce evidence but it is not exceptional.[66]

7. The defence's investigations

The adversarial system is based on the idea of a contest between two equal parties whose struggle will lead to the discovery of truth; consequently, an adversarial criminal procedure should grant and safeguard the defence's right to investigate its own case in order to generate favourable evidence for submission during the trial. This approach differs from the inquisitorial one where the figure of the *giudice istruttore* is predominant in the preliminary investigations and his impartiality safeguards the defence's rights. In the Italian criminal justice system, due to its deep-rooted inquisitorial legal tradition, it was difficult for such powers to be allocated to defence lawyers despite the system embracing an adversarial model. The original version of the 1988 criminal procedure code did not regulate the investigative powers of the defence counsel in detail. Article 38 of the dispositions

64 Corte Costituzionale, sentenza n. 203/1992.
65 Corte di Cassazione Penale, Sezioni Unite, sentenza 6 November 1992.
66 Corte Costituzionale, sentenza n. 111/1993.

for the implementation of the code vaguely stated that in order to exercise the "right to prove" (*ex* article 190 CPP) the defence counsel had the right to undertake investigations with the intention of gathering evidence favourable to their clients and to question persons who could give information. In 1995, Law n. 332 added two extra paragraphs that envisaged the important possibility for the defence counsel to present the outcome of his investigation directly to the judge. In other words, the right of the defence to carry out its own investigations was recognised, but the implementation of such right was not regulated.

In 2000, Law n. 397 introduced the regulation of the defence's right to investigate in the criminal justice system. The lawmaker's intention was to adapt the system to the constitutional reform of the fair trial (*giusto processo*) that had taken place only a year earlier. Specifically, they intended to guarantee the effectiveness of the defendant's right (envisaged in article 111 of the Constitution) to defend himself by putting forward evidence to prove his case in a trial that had turned out to be run by the parties.

In sum, nine articles (391 *bis* – 391 *decies*) were added to the code of criminal procedure under the section concerning the defence's investigation. The defence was granted the rights, *inter alia*, to receive or solicit statements from people informed of the facts relevant to the proceedings,[67] to directly request the documents important for the investigation from the relevant public authority,[68] to access places in order to describe their state and to perform technical, graphical, photographic or audiovisual surveying,[69] as well as to access, following judicial authorisation, places not accessible to the public.[70] The result of the defence's investigation is included in the defence dossier that can be presented directly to the judge (be it the GIP, the GUP or the trial judge).[71] The reform also envisaged the possibility for the defence to carry out preventive investigations, before the beginning of proceedings, as well as investigations following the issuance of the decree that commits the case for trial.[72]

In the context of the present work, it is relevant to assess the effectiveness of the defence's right to investigate. Moreover, it is important to investigate if and to what extent the defence's investigations are intertwined with disclosure obligations. In this perspective, two controversial aspects of the regulation of the defence's investigations in the code of criminal procedure arise.

First, from a reading of the provisions regulating the defence's investigations it emerges that the defence has no right or power to seize material relevant to its case. Supposing that a suspect has known about the ongoing preliminary investigations

67 Article 391 *bis* CPP.
68 Article 391 *quater* CPP.
69 Article 391 *sexies* CPP.
70 Article 391 *septies* CPP.
71 Article 391 *octies* CPP.
72 Article 391 *nonies* CPP, article 327 *bis* CPP and article 430 CPP. The preventive investigative activity is limited to those acts that do not require judicial authorization.

and his defence deems it necessary to acquire a specific item, it has to submit a request to the prosecutor who can deny it with no requirement for justification.[73] If the request is not met, a party can turn to the judge for the preliminary hearing to have it reassessed. This procedure compels the defence to disclose to the prosecutor the source of evidence it is trying to gather. Furthermore, while requesting the prosecution's cooperation, the defence has to show the relevance of the specific material to its case broadening the disclosure of its strategy to its opponent. The prosecutor, on the other hand, can decide freely on the acquisition of any element he considers necessary to its case with no duty to disclose it during the preliminary investigations. It would be recommendable that the defence could address its request directly to a judge who could proceed with the seizure on behalf of the defence with the cooperation of the police.[74] This consideration applies particularly to cases involving indigent defendants where the defence counsel encourages a more inquisitorial approach to the investigations in relation to investigative activities whose cost is significant.

Second, it is worth dwelling on the provision of article 391 *bis* CPP that regulates the defence's right to receive or solicit statements from people informed of the facts relevant to the proceedings. The defence has been granted the right to collect statements directly with no interference from the prosecutor. The statements collected have the same weight and value as statements collected by the prosecutor. Problems arise when the person requested to give his statement refuses to collaborate with the defence. The difference between the defence and the prosecutor is striking considering that the latter can summon the person compelling him to appear whereas the defence has no such power. The defence can either obtain the *subpoena* through the prosecutor who will then be present (asking his own questions) at the questioning of the person summoned or alternatively opt to proceed directly with the anticipated acquisition of the testimony before the judge (*incidente probatorio*).[75] Again, the defence is forced to disclose to the prosecutor its strategy in relation to the evidence demonstrating the relevance and use of the requested interrogation. Such assessment is in the hands of the prosecutor when the defence opts for the first alternative mentioned above.

It is problematic (particularly in the context of a system that leans towards an adversarial model) that the enforcement of the defence's right to investigate depends on the prosecutor's involvement. Moreover, it is unfortunate that the defence, in order to convince the prosecutor to act on its behalf using his coercive powers is obliged to disclose its strategy and to prove the relevance of the evidence that the defence intends to acquire. While acknowledging the structural differences existing between the prosecutor and the defence in the criminal justice system, it is essential that the defence be put in a position to carry out its own investigations effectively without an obligatory interaction with the opposing side.

73 Article 368 CPP.
74 Sammarco A.A., *Tempo e Condizioni delle Investigazioni Difensive: Un Caso di Inesistenza del Giusto Processo*, Diritto Penale e Processo, 2008, 4, 525.
75 Article 391 *bis* paras. 10 and 11.

It is contended that two interventions by the lawmakers appear necessary to grant and safeguard the effectiveness of the defence's investigations. Preliminarily, the adoption of provisions able to grant the defendant knowledge of the ongoing investigations in advance is desirable. The provision of article 415 *bis* is not sufficient to ensure the effectiveness of the defence's right in relation to the creation of the evidence. The defence's intervention when the prosecutor's material has been largely collected and the limited period the defence has for gathering evidence envisaged by the code prejudices the effectiveness of the defence's investigation. The regulation of the defence's investigation is emptied of its intended meaning if it is not strictly linked to the provision of a summary of the existence of the proceedings at the preliminary investigation stage.

This intervention should be coupled with the adoption of provisions aimed at sparing the defence's investigation from intervention by the prosecutor. A *super partes* organ should be the referent of the defence in relation to the request to carry out an arrest or to summon a person able to explain relevant facts. This solution would safeguard the rights granted to the defendant in relation to the defence's investigations and would eliminate the link between the enforcement of such rights and any indirect disclosure to the prosecutor which occurs in the current system. However, it cannot be overlooked that the suggested course of action implies significant costs which may constitute an important obstacle to its practical realisation.

The analysis carried out shows that disclosure plays a crucial role in the defence's investigation. It seems arguable that, from the perspective of the defence, positive and negative disclosure can be identified. The first is the disclosure to the suspect of the existence of proceedings against him that leads to the defence beginning an investigation of its own The second disclosure affects the investigations being carried out by the defence, as it is the obligatory price to pay for the prosecutor's collaboration in the enforcement of the defence's right in the structure created by the code.

8. Concluding remarks

Italian criminal procedure is an interesting and peculiar example for comparative study in light of its recent attempt to shift from its deeply rooted inquisitorial nature to a criminal justice procedure inspired by the core principles of the adversarial tradition. The analysis conducted shows that several elements of the previous inquisitorial procedural system have not been relinquished in this process.

For instance the system, being reluctant to leave the truth seeking process entirely in the hands of the parties maintained the power of the judiciary, *inter alia*, in relation to the admission of evidence that if considered necessary can be admitted *motu proprio* by the judges. Also the role played by the prosecutor remains closer to the inquisitorial tradition, although the system formally requires him to act as a party on the same footing as the defence. The defence's position during the

preliminary investigations is safeguarded by the impartiality that is still recognised in the prosecutor who continues to be part of the same professional judicial body as the judges. This conception of the role of the prosecutor seems to be the heritage of the inquisitorial figure of the *giudice istruttore*.

The Italian choice of adopting the principles of the adversarial model while maintaining inquisitorial elements bears important consequences on the regulation of the disclosure of information in criminal justice proceedings.

The analysis conducted reveals that, in the light of the structure of the Italian criminal procedural system envisaged by the 1988 CPP, disclosure assumes a different meaning and consequences depending on at which stage of the proceedings it operates. It is possible to configure two different types of disclosure. An "external disclosure" that refers to the information to the relevant person of the beginning/existence of criminal proceedings (although at its embryonic phase) against him and an "internal disclosure" that refers to the material gathered through the investigations and to the evidence the parties intend to present at trial and therefore the essence of the case. It can be imagined as an architect unveiling a project showing first the structure of the building and then its interior.

The "external disclosure" of the preliminary investigations to the suspect is an essential feature of the criminal procedure because the defence can exercise its right to participate in the investigation, gathering material to counter the prosecution's allegations only once it knows of the existence of the investigation. Once the preliminary hearing judge has committed the case for trial the disclosure of information ("internal" disclosure) assumes a more classical function of disclosing the material gathered by the parties so as to avoid the introduction of surprise evidence at trial.
The scrutiny carried out revealed some critical aspects of criminal procedure in relation to the disclosure process. The structure of the discovery scheme in the preliminary investigation stage, in fact, does not grant the certainty of the suspect being informed of the ongoing investigations. It merely allows for the possibility that such disclosure will take place linking it to the key role played by the prosecutor.

The prosecutor is in the best position to determine whether and when a person must be informed that they are under investigation. Moreover, in several segments of the procedure, he becomes the authority the defence has to turn to for the enforcement of its disclosure rights. The provisions of articles 335 and 369 CPP have set up a scheme that allows the request for disclosure to be made by the suspect and the decision to do so is left to the prosecutor conducting the investigation. This lack of certainty is coupled by the vagueness of the information a suspect might obtain. Such information is indeed limited to the provisions of the law allegedly violated and the time and place in which it may have occurred. The content of the information corroborates the idea that disclosure during the preliminary investigations enables an "external" knowledge of the proceedings rather than knowledge of its merits.

The combined reading of articles 329 and 415 *bis* CPP identify the end of the preliminary investigations as the moment at which a suspect (if the prosecutor is leaning towards asking for the committal of the case) enjoys the certainty of the disclosure of information about the existence of an investigation and the material it may have gathered. Striking the balance between the public interest in the effectiveness of the investigations and the suspect's right to be informed at such a late stage of the criminal proceedings might prejudice the effectiveness of the defence's investigation.

In addition, the analysis carried out has stressed that the defence might be compelled to seek the assistance of the prosecutor (with no guarantee of success) in order to carry out further investigation. The same situation applies to the enforcement of certain powers of investigation that the defence has (such as the right to collect witness statements) which the system grants to the accused. The defence has to disclose the nature of the evidence it is trying to gather and above all, it has to show the relevance to its case, broadening the compulsory indirect disclosure the system requires in exchange for the prosecutor's potential cooperation.

The defence's investigation is reduced of its meaning if the system does not ensure that the defence is informed in advance of the existence of the proceedings against it as well as if it links the enforcement of these investigative powers enjoyed by the defence to the prosecution.

Finally, the permissive jurisprudence analysed and the judicial activism in the admission of evidence (that allows the judge to present evidence *motu proprio*) reflect an inquisitorial conception of the truth as a superior value and creates ground for the admission of relevant evidence that whether intentional or not has been withheld from the opposing party. This approach, while perfectly legitimate, appears difficult to reconcile with the proclaimed attempt to establish an adversarial criminal justice procedure to regulate a trial led by the parties.

III. Disclosure of information in the French criminal law system

Introduction

> "The adversarial system of justice is by nature unfair and unjust. It favors the strong over the weak. It accentuates social and cultural differences, favoring the rich who are able to engage and pay for the services of one or more lawyers. Our own system is better, both in terms of efficiency and the rights of the individual. I prefer, and I want to make this quite clear, an independent judge who investigates the evidence for and against the suspect, to a system where police officers carry out a large part of the investigation without any form of judicial supervision".[1]

This section examines the French criminal procedure and the way in which it regulates disclosure obligations. This investigation begins with an overview of the main historical developments taken from the *Ancien Régime*, through the enactment of the 1808 Napoleonic *code d'instruction criminelle,* until the adoption of the current code of criminal procedure (*code de procédure pénale)* of 1958. This brief description of the roots of the criminal law system facilitates the understanding of the main elements that characterise the modern code of criminal procedure.

The French criminal justice procedure (in relation to the most serious offences, to which this analysis is limited) can be artificially divided into three distinct phases made up of the police investigation and prosecution, the judicial investigation and the trial. An overview of each of these stages, their protagonists and their main procedural steps allow the segments of the criminal procedure where disclosure plays (or should play) a role to be singled out. In this context, the role of the prosecutor is investigated. Moreover, the main reforms of criminal procedure of 1993 and 2000 are discussed in order to single out their essential features in relation to the rights of the defence.

Furthermore, attention is paid to the relationship between French criminal procedure and the European Convention on Human Rights (European Convention) regarding the protection of the rights of the defence. The European Court of Human rights has influenced the development of the French criminal procedure through its jurisprudence, which on multiple occasions has found France in violation of the Convention.

This preliminary analysis paves the way for the description and assessment of the functioning of the disclosure of information to the suspect/accused with particular attention to the right to be informed of the nature of the accusations, the right to have access to legal assistance and the possibility of having access to the *dossier*. Finally, a few concluding remarks are offered summarising the outcome of the analysis carried out.

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1 The then Justice Minister, Elisabeth Guigou, presenting the reform project to the *Sénat*, 15 June 1999.

1. The origins of the contemporary French criminal procedure

Under the *Ancien Régime*, which preceded the 1789 Revolution, there was no centralised system of justice. The king was the focus of the system and he delegated the administration of justice to his officials through the establishment of sovereign and seigniorial courts. The Monarchy, the Church, the Nobility and the so-called Third Estate characterised the social context in which authoritarianism, inequality and feudalism were at the core of the administration of justice.[2] People were subjected to different laws according to their affiliation to one or another social group and were tried before regional courts. Laws depended on local customs and the king (or other feudal authorities) could arbitrarily dispense privileges and exemptions from the applicability of the laws. The lack of legislative consistency characterising the *Ancien Régime* was partly due to geographical differences within the French territory. Specifically, in the south of France the written law (*le droit écrit)* rooted in the Roman tradition was in force whereas in the central and northern regions of France the customary law (*le droit coutumier*) of German origin was applied. In addition, feudal law and canon law also played a relevant role in the fragmentation of the legal and judicial system of France under the *Ancien Régime*.[3]

It was only under the reign of King Louis XIV, whose legislative power had gained wide recognition throughout the kingdom, that the first comprehensive bodies of laws were enacted in the form of ordinances. In 1670 a criminal ordinance (*Ordonnance criminelle de 1670)* was enacted and came into effect on 1 January 1671. It covered both criminal procedure and criminal law. This text was the first attempt to codify provisions of the criminal procedure applicable throughout all of France and remained in force until the 1789 French Revolution. The procedure enforced through the *Ordonnance criminelle* had scarce consideration for the rights of the defendant who was denied access to legal representation and remained ignorant of the charges against him. In addition, the inquisitorial character of the procedure characterised both the pre-trial stage and the trial itself. The detention of the suspect in order to obtain proof was a routine procedure and torture was allowed in the preliminary stage in order to extort a confession. Another striking element of the criminal procedure enacted in 1670 was the cruelty of the punishments that were imposed with sentences such as hanging, beheading, burning at the stake and mutilation, which were inflicted publicly as a deterrent. Due to the lack of a separate criminal code and the ordinance's considerable omissions in the definition of crimes and punishment, judges were granted wide discretionary powers. For instance, where the ordinance did not envisage a punishment for a specific crime or did not qualify a certain conduct as a crime, the judges could determine what constituted a crime and choose the punishment they considered appropriate among those applicable to other crimes. The concentration of powers on the judges and public prosecutors gave rise to many abuses of power.[4]

2 Hodgson J., *French Criminal Justice, A Comparative Account of the Investigation and Prosecution of Crimes in France,* Hart Publishing, Oxford and Portland Oregon, 2005, pp. 14-15.
3 See Hodgson, above n. 2.
4 See Lawson Oates J., *The Influence of French Revolution on Legal and Judicial Reform,* Simon Fraser University, 1980.

Although in the years preceding the French Revolution proposals for the reform of the criminal procedure system as regulated by the 1670 *Ordonnance criminelle*[5] existed, it was only with the advent of the Revolution that the *Ancien Régime's* criminal procedure was reformed. Philosophers such as Montesquieu, Voltaire and Beccaria contributed to moving the public opinion towards a possible reform of the system whose cruelty and arbitrariness were still perceived as "necessary harshness".[6] Their contribution was the promotion of the abolition of the death penalty and the physical punishments, the affirmation of the certainty of the crimes, the proportionality of punishments and the importance of crime prevention rather than merely crime punishment. The philosophers also thought that legal reforms could only be achieved by bypassing the judiciary, which (with few exceptions) was rather conservative and not prone to the implementation of any of their ideas.

The 1789 Revolution intended to eradicate the inequality and discrimination upon which the system was based, affirming a new order founded on the people's sovereignty. The Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de l'Homme et du Citoyen*), adopted by the Constitutional Assembly on 25 August 1789, embodied the core of the revolutionary ideas of *liberté, égalité* and *fraternité*. In relation to the legal and judicial reform, the Declaration envisaged, *inter alia*, a single legal system equally applicable to all, the presumption of innocence, the abolition of cruel and inhuman punishments as well as the abolition of arbitrary arrest and detention. The declaration became the preamble to the 1791 French Constitution that established a constitutional monarchy.

In September 1791, the Constituent Assembly passed a decree that reformed the criminal procedure introducing the jury trial (based on the English system) characterised by a predominance of oral arguments throughout the procedure. The decree provided guarantees to the accused in the jury trial whereas the provisions concerning the pre-trial examination were less effective in granting rights to the suspect. The justice of the peace, who was a police magistrate, could initiate proceedings and therefore combined the two important functions of prosecutor and examining magistrate. In relation to disclosure it is worth mentioning that while the written statements taken during the preliminary examination (which were not usable at trial) were not provided to the jury, they were made available at trial to only the prosecutor and not the defence.

Moreover, the Constituent Assembly promulgated a Penal Code in September 1791, which clarified the definition of crimes and confirmed that the application of punishments must be independent of the social status of the perpetrator. The code limited the death penalty and abolished physical punishment. In 1795, a comprehensive code of criminal procedure and criminal law was promulgated. The code focused mainly on the criminal procedure and it granted to the defendant the

5 These proposals advocated, *inter alia*, the introduction of the legal representation of the accused, the public celebration of the criminal trials and the restriction of the powers of the examining judge and more importantly the compilation of a criminal code able to grant certainty to the definition of crimes and the punishments.

6 Lawson Oates, above n. 4 at p. 21.

right to have access, during the trial, to the written statements collected during the preliminary examination on the same footing as the prosecution.

Following the establishment of the first French Republic in 1792, a more centralised system of administering justice was put in place under Napoleon Bonaparte following his rise to power in 1799. The republican state was based on the idea that the sovereignty of the people was exercised through a very centralised state (étatisme). Consequently, the state became the "representative and guardian of the public interest".[7] This conception of the role of the state is still central in contemporary France. Napoleon reformed the French legal system in accordance with the ideas of the 1789 Revolution. A unique and centralised legal system replaced the many different local ones.

In November 1808, a *code d'instruction criminelle* was enacted.[8] The code forms the basis of the modern so-called inquisitorial system of criminal procedure. It combined the core principles of the Revolution and the *Ancien Régime*. The *code d'instruction criminelle* had a remarkable life span considering that it was replaced only in 1958 by the *code de procédure pénale*, which is still in force.

The code re-introduced an inquisitorial pre-trial investigation (which had been removed following the 1789 revolution) and maintained a more adversarial character at the trial stage. This combination is still the foundation of the French criminal procedure. In contrast with the acknowledgment of the presumption of innocence of the defendant, the code envisaged remanding a suspect in custody in serious cases as a routine procedure, establishing a *de facto* presumption of guilt.

The preliminary investigation regulated by the *code d'instruction criminelle* restricted the suspect's rights stating that, *inter alia*, the accused could not request any investigation be carried out by the magistrate and that he would remain ignorant of the nature of the charges brought against him until the trial. Trials were held in public and the accused had the right to be assisted by a lawyer and to have his witnesses interrogated.

2. The French 1959 code of criminal procedure

2.1 Introduction

The code of criminal procedure currently in force in France entered into force in 1959 and was subsequently amended several times due to various reforms of the criminal procedure undertaken by different governments. The code of criminal procedure is the result of the work of a commission presided over by the then *Procureur Général*, M. Antoine Besson. The commission worked without any contribution from the judiciary or academia.

7 Ibid. at p. 16.
8 In 1810, also a new Penal Code was enacted under Napoleone Bonaparte.

Article 111-1 of the penal code states that criminal offences are categorised, according to their seriousness, as felonies, misdemeanors or petty offences (*crimes, délits et contraventions*). This distinction is important, as the rules of criminal procedure have developed around it. For instance, an *instruction* is mandatory only for serious *crimes,* punishable by imprisonment from five to twenty years and life imprisonment and is only occasionally used for *delits* and *contraventions*. Furthermore, *crimes* will be tried before the assize court (*cour d'assises*) whereas misdemeanors (*délits),* which include the vast majority of crimes such as theft, fraud and less serious drug cases (punishable with imprisonment of up to five years or a fine of €3,750 or more) will be dealt with in the correctional court (*tribunal correctional*). Petty offences (*contraventions),* which are punishable by a fine up to €3,750 are exempted by the *instruction* and tried in the police court (*tribunal de police*).

As mentioned in the introduction the current criminal procedure envisages three separate stages of criminal proceedings for the most serious crimes: the police investigation and prosecution, the judicial investigation and the trial. The main characteristics of these three stages are illustrated below.

2.2 The police investigation

In France, the judicial police (*la police judiciaire*) consists of two different types, the *Police nationale* and the *Gendarmerie*. Two main kinds of police investigations (*enquête)* can be carried out namely the preliminary investigation (*enquête préliminaire)*[9] and the flagrant offence enquiry (*enquête à cas d'infraction flagrante).*[10]

The judicial police carry out a preliminary investigation (*enquête préliminaire*) on the reported crimes under the prosecutor instruction or on their own initiative. In both cases, the police are subject to the supervision of the public prosecutor (*procureur général*). The preliminary investigation can be described as non-coercive in nature. The police can carry out searches, house visits and the seizing of exhibits only with the written consent of the person concerned. When consent is denied only the liberty and custody judge, upon request of the public prosecutor, can authorise the police to proceed with force.[11] The non-coercive character of the police investigation is subject to two main exceptions; the right to conduct identity checks and the so-called *garde à vue*.

In relation to the first, the police have the power to ask any person to prove his identity by any means, where one or more plausible reasons exist to suspect "that the person has committed or attempted to commit an offence or that the person is preparing to commit a felony or a misdemeanor; or that the person is able to give information useful for an inquiry into a felony or misdemeanor; or that the

9 Articles 75-78 *code de procédure pénale.* For the English version of the French Code of Criminal procedure the following source has been used: www.legifrance.gouv.fr.

10 Articles 53-74 *code de procédure pénale.*

11 Article 76 *code de procédure pénale.* This applies to inquiry into a felony or a misdemeanor punished by a prison sentence of five years or more.

person is the object of inquiries ordered by a judicial authority".[12] In case the person concerned refuses or is unable to provide his identity the police can detain him for up to four hours while enquiries are made.

The *garde à vue* (literally *watched by sight*), allows the police, where necessary for an inquiry, to arrest and detain any person against whom there exist one or more plausible reasons to suspect that he has committed or attempted to commit an offence.[13] This practice has been the subject of heated debates on the restriction of the defence's rights and its compliance with the European Convention on Human Rights. Recently, the main provisions regulating the *garde à vue* have been found unconstitutional and several changes have been adopted for the regulation of this form of custody.[14] These issues will be analysed in detail below in its relation to disclosure.

The police are granted powers that are more extensive when a flagrant offence enquiry is carried out (*enquête à cas d'infraction flagrante)*. That happens in relation to *crimes* or *délits* that are in the course of being committed or have just been committed.[15] The police immediately inform the district prosecutor of the flagrant crime detected.[16] The police officers visit the scene of the crime where they can secure all the evidence, seal off the area, carry out identity checks and compel the attendance of anyone thought to be able to provide useful information. Searches during the *enquête à cas d'infraction flagrante* may be carried out without the consent of the person concerned. At this stage, judicial involvement is rather limited and the police might seek the cooperation of the prosecutor when they do not have sufficient powers to deal with a specific situation.[17] The judicial direction of the prosecutor is more frequent in high profile and complex cases.[18]

2.3 The prosecution

When the police consider the investigation complete, or that there is enough evidence to start a judicial investigation, they transmit the *dossier* to the prosecutor who is in charge of the decision of whether or not to commence judicial proceedings. The prosecutor can order the police to investigate further if he considers the *dossier* insufficient and is therefore unable to make a decision. Article 40-1 of the *code de procédure pénale* states that the prosecutor decides whether to initiate prosecution, to implement alternatives to prosecution[19] or to close the case without any further action where the content of the *dossier* justifies this choice. The public interest is the main consideration in the prosecutor's assessment of whether or not to proceed

12 Article 78-2 *code de procédure pénale*.
13 Article 62-2 *code de procédure pénale.*
14 Constitutional Council, Decision n. 2010-14/22 QPC of 30 July 2010. Available in English at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/decisions-of-the-constitutional-coucil-qpc.48658.html. See also Law n. 391/2011 and Law n. 535/2014.
15 Article 53 *code de procédure pénale.*
16 Article 54 *code de procédure pénale.*
17 Vogler R. and Huber B., *Criminal Procedure in Europe*, Dunker and Hublot, Berlin, 2008, p. 201.
18 Ibid at p. 201.
19 The code of criminal procedure envisages alternatives to prosecution such as, *inter alia*, a bail or a penal fine. See Article 41-2 and 41-3 *code de procédure pénale.*

(*opportunité de la poursuite*).
When the prosecutor decides to prosecute a case, he can request (by warrant) the commencement of a judicial investigation (*instruction*) by an investigating judge (*juge d'instruction*).[20] This procedure is mandatory in case of *crimes*. It is also mandatory in cases of *délits* and *contraventions* of the fifth category, which have been committed by a juvenile, or in case the perpetrator of an offence is unknown.[21] The prosecutor can, where the case does not concern a serious offence (*crimes*), summon the defendant (*citation directe)*. The summons, which is served to the defendant by a court bailiff, informs him that he is being charged and of the place, date and time of the hearing. The lawyer for the defence may at any time examine the case file.[22] This procedure is usually used when there is no urgency and the defendant is not in custody. Alternatively, if the prosecutor believes that the case is ready for trial, the *comparution immédiate* allows him to bring the defendant immediately before the court (*tribunal correctionnel).*[23] This procedure is applicable to cases pertaining to offences (*délits*) for which the maximum term of imprisonment is no less than two years (six months in case of flagrant offences). Also in relation to this procedure, defence lawyers will be granted immediate access to the *dossier*.

2.4 L' instruction

The judicial investigation's main goal is the discovery of the truth (*la manifestation de la vérité*).[24] The investigation must be objective and must address all the evidence available both in favour and against the suspect (à charge et à décharge). An investigation may be opened only through a request by the public prosecutor (*réquisitoire afin d'informer*)[25] or occasionally through a complaint made by the victim alongside a petition to become a civil party to the trial (*plainte avec constitution de partie civile*).[26] The investigating judge (*juge d'instruction*) is responsible for the judicial investigations and it is only the judge who can order their closure.[27] The public prosecutor, in fact, once the *instruction* has been opened becomes a party to the proceedings losing his former leading role.

The Investigating Chamber (*Chambre de l'Instruction*) is the judicial organ that is granted the power to review the whole process of the judicial investigation. Where particular acts have been carried out in breach of the law it can pronounce their nullity and, where necessary, it can determine the nullity of all or part of the subsequent proceedings.[28] Every four months the *juge d'instruction* must inform

20 Article 80 *code de procédure pénale.*
21 See Vogler and Huber, above n. 17 at p. 203.
22 Article 394 *code de procédure pénale.*
23 Article 395 *code de procédure pénale.*
24 Article 81 *code de procédure pénale.*
25 Article 80 *code de procédure pénale.*
26 Article 51 *code de procédure pénale.*
27 The Law n. 2007-291 envisages the introduction of a *college d'instruction* composed by three judges of investigations for each *instruction,* which will replace the *juge d'instruction*. So far its entry into force has been postponed several times and, at the time of writing is set on 1 January 2015.
28 Article 206 *code de procédure pénale.*

the president of the *Chambre de l'Instruction* about the cases he is investigating. The Investigating Chamber may order any additional investigatory step it deems appropriate, upon the application of the public prosecutor, a third party or on its own motion.[29]

Through the warrant requesting the opening of an investigation the prosecutor limits the scope of the investigation to the facts as described therein. Where an offence not covered by the prosecution's warrant is brought to the investigating judge's knowledge, he must communicate the complaints or the official records that establish its existence to the district prosecutor without delay.[30] The district prosecutor may then require the investigating judge to investigate the additional facts.[31]

In addition to the facts mentioned in the prosecutor's warrant, the investigation also focuses on the personality of the suspects as well as "on their financial, family or social situation."[32] This inquiry is mandatory in serious offences and optional for misdemeanors. The investigating judge may extend the charge to those who, in the course of the investigation, appear to be involved in the commission of the criminal offences under investigation. The *juge d'instruction* may investigate those persons "against whom there is strong and concordant evidence making it probable that they may have participated, as perpetrator or accomplice, in the commission of the offences he is investigating" (*mise en examen*).[33]

The investigating judge enjoys wide powers to obtain all relevant available evidence to include in the *dossier*. He interrogates the defendant (*personne mise en examen*)[34], the civil party and witnesses, he may request expert evidence and he may also issue rogatory commission to the police. Furthermore, the investigating judge may issue a search warrant[35], a subpoena, a summons or an arrest warrant as well as place someone on conditional bail.[36] The power to remand a suspect in custody belongs to the liberty and detention judge (*juge des libertés et de la détention*), who is not involved in the investigation and is also given the power to authorise wire-tapping in private houses.[37]

The public prosecutor, in addition to demanding access to the case files at any time during a judicial investigation, can request the *juge d'instruction* to undertake a

29 Article 201 *code de procédure pénale.*
30 Article 80 *code de procédure pénale.*
31 Article 80 *code de procédure pénale* states that 'the district prosecutor may then require the investigating judge, by an additional submission, to investigate the additional facts, or require him to open a separate investigation, or send the case to the trial court, or order an inquiry, or decide to drop the case, or proceed to one of the measures provided for in articles 41-1 to 41-3, or to transfer the complaint or the official reports to the district prosecutor who is territorially competent. If the district prosecutor requires the opening of a separate investigation, this may be entrusted to the same investigating judge, designated under the conditions set out in the first paragraph of article 83".
32 Article 81 *code de procédure pénale.*
33 Article 80-1 *code de procédure pénale.*
34 The investigation cannot end without the interrogation of the suspect unless he concludes that there is no case to answer.
35 Article 122 *code de procédure pénale.*
36 Article 138 *code de procédure pénale.*
37 The liberty and detention judge was created by Law n. 516 of 15 June 2000.

specific investigation that he believes "useful for the discovery of the truth as well as any safety measure necessary".[38] The civil party and the defendant may also apply to the investigating judge asking him to take any step they consider necessary for the discovery of the truth.[39]

Once the judicial investigation is completed, the investigating judge transmits the *dossier* to the public prosecutor and informs the parties and their advocates.[40] The prosecutor and the parties have one month to file their submissions if the person under judicial investigation is detained or in other cases three months. The *juge d'instruction* assesses the evidence gathered at the end of the investigation in order to determine whether there are elements that constitute an offence of which he determines the legal qualification.[41] The closing order issued by the investigating judge states either that the case should be tried or that there is no case to prosecute.[42] Until 2000, the French criminal justice procedure envisaged a "double level" of *instruction* in relation to cases concerning *crimes*. The investigating judge could not unilaterally dispose the referral of a case involving a *crime* to the *Cour d'Assises* but rather the file would be sent to the prosecutor who in turn would ask the *Chambre de l'Instruction* to scrutinise it and to decide whether or not to transfer it to the Assize Court. Currently, this mandatory second level of judicial investigation has been abolished due to the establishment of a second level of trial, which allows a case tried before the *Cour d'Assises* to be appealed and tried a second time before a different *Cour d'Assises*.[43] In other words, a system characterised by two levels of instruction and one trial has been replaced by a criminal system forming one mandatory instruction and potentially two levels of trial.[44] However, it is still possible that the *Chambre de l'Instruction,* if asked by the prosecutor or by the defendant, undertakes a full review of the *dossier* of the judicial investigation.

2.5 The Trial stage at the Cour d'Assises

A case reaches the *Cour d'Assises* through a committal order issued by the investigating judge. The code of criminal procedure envisages a certain number of "compulsory preliminary steps" to be taken before the opening of the trial. A copy of the official records establishing the existence of the offence, of the written statements of witnesses and any expert reports must be delivered to every accused person and civil party.[45]

The *dossier* must be transferred to the *Cour d'Assises* in order to allow its president, and only him, to study it. The president, at least five days before the beginning of

38 Article 82 *code de procédure pénale.*
39 Article 82-1 *code de procédure pénale.*
40 Article 175 *code de procédure pénale.*
41 Article 176 *code de procédure pénale.*
42 Elliott C., Jeanpierre E., Vernon C., *French Legal System*, 2nd Edition, Pearson Education Limited, 2006, p. 216. Article 177 *code de procédure pénale* states that "if the investigating judge considers that the facts do not constitute a felony, a misdemeanor, or a petty offence, or if the perpetrator has remained unidentified, or if there are no sufficient charges against the person under judicial examination, he makes an order ruling that there is no cause to prosecute".
43 Article 380-1 *code de procédure pénale.*
44 See Vogler and Huber, above n.17 at p. 215.
45 Article 279 *code de procédure pénale.*

the trial, has to meet the defendant to make sure that he has received the documents and has appointed a lawyer. Legal representation is in fact mandatory before the *Cour d'Assises*. The public prosecutor and the civil party serve to the accused, and vice versa, the list of their witnesses and experts.[46] During the preparatory phase, which precedes the hearing, the president, if he considers the judicial investigation incomplete, can order any further investigative activity he deems useful for the discovery of the truth. These activities are carried out by the president, by one of his assessors or by an investigating judge who he delegates this task.[47]

When the "compulsory preliminary steps" have been exhausted, the hearing can begin. The principle of the *continuité des débats* applies and therefore the hearing must continue until the case is ended by the assize court judgment.[48] The president asks for the defendant's identity, the so-called *interrogatoire d'identité*[49], then the jury is appointed through a draw of nine jurors from a list of forty. The prosecutor and the defence enjoy the power to challenge four and five jurors respectively. Once the jury has been constituted the president orders the bailiff to call the roll of the witnesses cited by the public prosecutor, by the accused and the civil party and asks them to retire to the room that is prepared for them.[50] After the clerk has read the committal warrant, the president proceeds explaining the procedural history of the case and begins the interrogation of the defendant, followed by the witnesses whose audition has been requested by the parties. Since the 2000 reform also the prosecutor, the defence lawyer and the lawyer for the civil party (if any) may, with the president's leave, ask the witnesses questions directly. Furthermore, the president has the discretionary power to summon and hear any person as well as to order the production of any new element that, in the light of the developments at the hearing, he believes useful for the discovery of the truth.[51]

Once all the evidence has been heard, the civil party, the public prosecutor and the defendant deliver in turn their final submissions. The defendant must have the final word. The president, before retiring the court and the jury to deliberate, summarises the questions that must be answered. The court determines the sentence where the defendant is found guilty.

3. The role of the Procureur

In France, the public prosecutor, the investigating judge and the trial judge belong to the same judicial body, namely the *magistrature*. They are appointed following the same competition and the same training at the National School of the Judiciary (École *nationale de la magistrature)*. The common selection procedure and training allow them to move from one role to another at different stages of their career. It is believed that the affiliation to the *magistrature* instills in its members a "universal

46 Article 281 *code de procédure pénale.*
47 Article 283 *code de procédure pénale.*
48 Article 307 *code de procédure pénale* also states that "the hearing may be suspended for the time necessary for the judges, the civil party and the accused to rest".
49 Article 294 *code de procédure pénale.*
50 Articles 324-325 *code de procédure pénale.*
51 Article 310 *code de procédure pénale.*

professional ethos"[52] and society entrusts them with the protection of the public interest.

The Superior Council of the Magistrature (*Conseil Supérieur de la Magistrature*) is the governing body for all magistrates. However, within the judiciary, a distinction can be made between judges (trial judges and investigative judges) defined as the sitting judiciary (*magistrats du siège*) and the prosecutors, referred to as the standing judiciary (*magistrats du parquets*). Only the judges enjoy constitutional independence whereas the prosecutors are hierarchically subordinated to the Ministry of Justice. The prosecution service is conceived, in fact, as the means of implementation of the government's criminal policy and is therefore guided in the performance of its functions by general instructions and specific directives emanating from the Ministry of Justice.[53] The failure to comply with these guidelines may lead to disciplinary action and in serious cases to dismissal. However, while the prosecution is obliged to abide by the Ministry of Justice's guidance, in relation to written submissions it remains "free to make such oral submissions as it believes to be in the interest of justice" (*la plume est serve mais la parole est libre)*.[54]

The judiciary-executive relationship finds its origin in the French republican tradition, based on the idea that the power lies with the people and the state administers it on their behalf, guaranteeing the protection of public order. There is no room for an independent prosecution service not elected by the people; on the contrary, the prosecutor must remain accountable to the government who, even if indirectly, is the expression of the popular vote. In addition, the hierarchical structure is seen as a way to enforce a uniform and coherent criminal policy at the national level. However, several scandals unveiling political pressure in the form of informal recommendations not to prosecute specific cases involving high profile politicians,[55] reinvigorated the argument that it would be desirable that prosecutors did not belong to the same professional body as the judges and that their career should not be dependent on the executive.[56]

The code of criminal procedure states that the prosecutor "exercises the public action and formally requests the law to be enforced".[57] The prosecutor enjoys considerable discretion in relation to the legal qualification to give to the acts investigated as well as in relation to the timing of the transfer of the case to the investigating judge (in cases concerning *crimes*). Considering that only a minority of cases (less than 7%)[58] are subject to mandatory instruction the prosecutor has a broad responsibility in relation to the managing of the majority of criminal cases.

52 Hodgson, above n. 2 at p. 69.
53 Article 30 *code de procédure pénale.*
54 Article 33 *code de procédure pénale.*
55 See Elliot, Jeanpierre, Vernon, above n. 42 at 153–5, describing how, in order to terminate an investigation regarding financial affairs of a high ranking politician and his wife, the Minister of Justice sent an helicopter to Katmandu, Nepal, where the prosecutor dealing with the case was on holiday, to get him to sign a document limiting the investigation. See also Hodgson, above n. 2 at pp. 79-85.
56 Dalle and Soulez Lairivière, *Le Monde* 30 May 2002, p.18, quoted in Hodgson, above n. 2 at p. 84.
57 Article 31 *code de procédure pénale.*
58 Hodgson J., *Recent Reform in the French Criminal Process*, International and Comparative Law Quarterly, Vol. 52, October 2002. p. 805.

In addition, the prosecutor performs an important supervisory function over the police investigation and the detention of suspects. Due to the inquisitorial nature of this segment of the pre-trial stage and the limited role conferred to the defence lawyer the prosecutor is expected, in addition to the enforcement of the law, to safeguard the rights of the suspect, especially when he is subject to the *garde à vue* regime. This is a rather ambitious combination of duties to concentrate in one subject. Nonetheless, as discussed above, the conception of the prosecutor as a *magistrat* and the hierarchical nature of the French legal process, explains, at least ideologically, this concentration of power in the hands of the prosecutor who represents only the public interest.[59] The ideology behind the *magistrat* as an impartial agent objectively applying the law is a central theoretical feature of the supervisory role conferred to the prosecutor in the pre-trial stage.[60]

However, the functioning of the prosecution service seems to be somewhat different from the theoretical and ideological ideas embraced by the French legal process.[61] First, the uniformity and certainty of the application of the government's criminal policy appears to be strictly dependent on the resources available to each prosecutor's office in different geographical areas which is at odds with the broad discretion that prosecutors are called to exercise in relation to each case.

More importantly, the role conferred to the prosecutor to guarantee the rights of due process for the suspect, appears hampered by several factors. The prosecutor's main task is to preserve the effectiveness of the investigation and to ensure that the police (when necessary) arrest, detain and interrogate the suspects in the name of the overriding goal of the public interest. A crime control oriented approach lies at the core of the public interest. It is therefore difficult to reconcile the protection of the due process rights of the accused with the duty to guarantee the effectiveness of the investigations and the search for the truth. It is worth quoting Hodgson's report of a *procureur* describing this friction:

> "There are two things which do not seem to me to go in the same direction. On the one hand, the need to protect the rights of the defence of the accused, his access to the dossier. On the other hand, the effectiveness of the police investigation. Sometimes, the measures taken [for the defence] can seem to go against this concern with effectiveness. For example I am totally hostile to the lawyer being present at the start of the *garde à vue*..."[62]

The important role of safeguarding the rights of the defence that the prosecutor should play, in the absence of a more adversarial involvement of the defence in the pre-trial stage, seems limited to ensuring that no procedural irregularities take place, in order to avoid the case being challenged. Another element that contributes to this status quo is the close relationship that exists between the prosecutors and

59 Hodgson J., *Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations*, Journal of Law and Society, Vol. 29, June 2002, p. 235.
60 Ibid. at p. 235.
61 See Hodgson, above n. 2.
62 Hodgson, above n. 59 at p. 253.

the police. The prosecutor is responsible for the investigation and the detention of the suspect however, a lack of personnel within the prosecution service and the enormous caseload render it impossible to supervise all the investigations and detentions of suspects carried out by the police. The prosecutor works with the police and together their final goal is to assemble a *dossier* on which the suspect can be successfully prosecuted. Within this framework, the suspect's rights and their protection are probably seen more as a burden than as a fundamental part of the prosecutor's work.

Interestingly, on 23 November 2010, the ECtHR delivered a judgment in the case of *Moulin v. France* in which it assessed the role of the prosecutor and the guarantees of independence that it offered in relation to the provision of article 5(3) of the European Convention.[63] Article 5(3) grants to the person arrested or detained on suspicion of having committed a criminal offence the right to "be brought promptly before a judge or other officer authorized by law to exercise judicial power". In *Moulin v. France*, the applicant had been held in police custody for five days before being brought before the investigating judge. She complained that her right to be brought promptly before a judge or other officer authorised by law to exercise judicial power had been violated. The Court considered whether the presentation before the deputy public prosecutor, which occurred two days after her arrest, could be considered as presentation before a competent legal authority for the purpose of article 5(3). The Court stated that "the characteristics that a judge or other officer must possess in order to satisfy the requirements of Article 5 precluded him or her, among other things, from intervening subsequently against the applicant in the criminal proceedings, as the prosecution did". The ECtHR concluded that, due to the dependent nature of the relationship between the Minister of Justice and the prosecuting authorities in France, the latter did not meet the required impartiality which was inherent in the in the notion of "officer authorised by law to exercise judicial power" as conceived in article 5(3).[64]

4. The French Criminal Procedure and the European Court of Human Rights

France runs a monist constitutional system, which envisages the direct incorporation of duly ratified international treaties or agreements into French law (article 55 of the French Constitution). These international instruments are hierarchically placed, within the sources of law, below the Constitution and above Parliament's laws. Although France was among the most active in drafting the European Convention on Human Rights it then resisted its incorporation and application in the domestic legal context. France was in principle hesitant to ratify the European Convention, as it feared it would interfere with the domestic law in the regulation of sensitive areas and would reduce sovereignty. The Convention was finally ratified in 1974. The right to an individual petition to the European Court of Human Rights was

63 *Moulin v. France*, ECHR, no. 3704/06, 23 November 2010.
64 Ibid at paras. 58-62.

enforced only in 1981 and gave rise to several condemnations of France in relation to a number of features of its criminal procedure.[65]
The French inquisitorial model, based on judicial supervision of the investigations, was not completely in line with the rights of the defence as envisaged by the Convention (articles 5 and 6 in particular), which were perceived as mainly accusatorial in nature. This diversity characterised the slow process of adjustment of the criminal procedure (particularly in relation to the pre-trial stage) to the new Convention, which France has undertaken since its ratification. The jurisprudence of the ECtHR has played a relevant role in the reforms of the French criminal procedure in 1993 and 2000, which are discussed below.

Two different approaches, a "virtuous" and a "vicious" one, can be delineated in the French approach to the jurisprudence from Strasbourg. The more constructive one saw the enactment of legislation in relation to the sensitive part of criminal procedure found in violation of the Convention. In addition, the *Cour de Cassation* developed its jurisprudence along the lines of the ECtHR findings. This "virtuous" process culminated in the 1993 reform.

However, after 1993, an attitude developed in both the courts and among lawmakers that minimised the impact of the Strasbourg judgments on domestic criminal practices. The Court of Cassation stated that Strasbourg's decisions, which entitled appellants to claim reparation for the excessive length of proceedings, had no direct effect on French domestic practices.[66] Furthermore, in 1999 the ECtHR found France in violation of article 3 of the Convention also on the ground of torture, making it the only country together with Turkey to have that finding against it.[67]
More condemnations followed this hostile approach and led in 2000 to a new important reform of the criminal procedural system aimed towards the affirmation of the accused's right to due process.
In several cases the ECtHR found that France had protracted provisional detention beyond what was reasonable[68] in accordance with article 5(3) of the European Convention, which states that "everyone arrested or detained... shall be entitled to trial within a reasonable time or to release pending trial".
The European Court of Human Rights was also called on to analyse article 583 CPP, which stated that "if a person sentenced to a term of imprisonment of more than six months has not surrendered to custody...his right to appeal on points of law shall be forfeited". The Court held that such a consequence "amounted to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society".[69] Nonetheless, French courts continued to apply this rule leading to further condemnations by the ECtHR.[70] Only in 2000 was article 583 CPP finally abrogated.[71]

65 Around half of the cases concerning France before the ECtHR regard its criminal procedure. See Hodgson, above n. 53 at p. 34.
66 Cour de Cassation, *Kemmanche*, 3 February 1993. *Kemmanche v. France,* ECHR, no.12325/86, 27 November 1991.
67 *Selmouni v. France*, ECHR, [GC], no. 25803/94, 28 July 1999. The case concerned police brutality during the *garde à vue*.
68 *Letellier v. France*, ECHR, no 12369/86, 26 June 1991, *Tomasi v. France*, ECHR, no. 12850/87, 27 August 1992, *Muller v. France*, ECHR, no. 21802/93, 17 March 1997.
69 *Poitrimol v. France*, ECHR, no. 14032/88, 23 November 1993.
70 *Omar v. France,* ECHR, [GC], no. 24767/94, 29 July 1998, *Khalfaoui v. France,* ECHR, no. 34791/97, 14 December 1999.
71 Law No. 2000-516 of 15 June 2000 (cf. Section 121) abrogated former Article 583 of the Code of Criminal Procedure.

In relation to the right to a fair trial, several judgments given by the Strasbourg Court had a considerable impact on certain aspects of French criminal procedure. It has been in relation to article 6 (2) and (3) that the ECtHR has found on multiple occasions France's criminal procedure to be in violation of the European Convention on Human Rights.

In *Reinhardt st Slimane-Kaïd* the reporting judge's report and draft judgment were communicated to the advocate-general but not to the defence and was therefore found to violate the accused's right to a fair trial.[72] The applicants' lawyers could listen to the first part of the report dealing with facts, procedure and grounds of appeal, but the reporting judge's opinion remained confidential. France responded to this judgment extending to the advocate general the prohibition to communicate the recommendation over sentencing.[73]

The European Commission of Human Rights's judgment in *Hakkar v. France,* was behind the amendment to article 622 CPP regarding the re-examination of cases successfully tried before the Strasbourg judicial institutions by domestic courts. Initially, France had refused to reopen the *Hakkar* case after the Strasbourg Court found it gravely breached the defence's rights.[74] Following the 2000 reform, article 626 CPP was amended and it now provides that cases, in the same circumstances as the *Hakkar* case, can be re-opened on request of the parties.

Most notably in relation to this study, the ECtHR, in *Foucher v. France,* confronted the defendant's right to access the *dossier*.[75] Mr *Foucher* and his father had been charged with using insulting and threatening words and behaviour towards public service employees and were summoned to appear before the Argentan Police Court. The offense is a petty offence. Mr. *Foucher* decided to represent himself and sought access to the file through his mother and then personally. On both occasions the requests were turned down. The Police Court upheld Mr. *Foucher*'s claim that there had been a violation of the rights of the defence. The Court of Appeal reversed this finding and the Court of Cassation confirmed the Appeal Court's findings.

Before the ECtHR Mr. *Foucher* claimed that there had been a violation of article 6(3) of the Convention because during these criminal proceedings he was not able to access the case file or to obtain a copy of the relevant documents contained within it. He stressed that consulting the documents in the case file before the hearing was essential in order to properly prepare his defence. Not having access to the *dossier* affected his ability to challenge the only basis for his conviction, which was the public employees report. The ECtHR found that "the applicant had been unable to prepare a sufficient defence and had not been afforded equality of arms".[76]

72 *Reinhardt st Slimane-Kaïd v. France,* ECHR, [GC], no. 23043/93, 31 March 1998.
73 See *Fabre v. France*, ECHR, no. 69225/01, 2 November 2004, paras. 29-30.
74 European Commission of Human Rights, *Hakkar v. France*, 27 June 1995. Mr. Hakkar had been condemned for the murder of a police officer in his absence and without legal representation.
75 *Foucher v. France*, ECHR, no. 22209/93, 18 March 1997.
76 Ibid. at para 36.

Interestingly, in its submission the French government noted how the Court of Cassation had reversed its previous case-law concerning the communication of the documents from a file where the defendant has already been sent for trial. It quoted the judgment of 12 June 1996 where the *Cour de Cassation* held that: "everyone charged with a criminal offence thus has the right, under Article 6 para. 3 (art. 6-3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, not to the immediate communication of the documents on the file but to the release, at his expense and, where appropriate, acting through his lawyer, of copies of the documents submitted to the court he has been summoned to appear before".[77]

In the case of *Péllissier et Sassi*, the applicant complained that there had been a violation of article 6(1) and (3) of the Convention in the domestic criminal proceedings against them insofar as they had been convicted of an offence which differed from the one they had been charged with (aiding and abetting criminal bankruptcy through the concealment of assets instead of bankruptcy).[78] The applicants submitted that they had not had the opportunity to challenge the alternative charge by putting forward their arguments and therefore they had not had adequate time and facilities to prepare their defence. The Court pointed out that article 6 (3)(a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation but also of the legal qualification given to those acts. In addition, it stated that "in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair".[79] It concluded that it was within the power of the Appeal Court to re-characterise the facts over which it had jurisdiction. However, the Appeals Court should have afforded to the defendant the opportunity to exercise his rights of defence in relation to the different legal qualification of the offence. Therefore, it held that there had been a violation of the accused's right to be informed in detail of the nature and cause of the accusation against them and of the right to have adequate time and facilities for the preparation of their defence.[80]

Finally, in the case of *Delta v. France*, the applicant submitted that he had been convicted of robbery on the sole basis of the testimony of the victim and the victim's friend.[81] He complained that he had not had a fair trial because neither he nor his lawyer was afforded the opportunity to examine the witness or have them examined in the course of the proceedings before the Paris Criminal Court and the Court of Appeal. The Court confirmed that the use of witness statements at trial did not breach the Convention as long as it did not affect the rights of defence among which the right to "adequate and proper opportunity to challenge and question

77 Ibid. at para 21 and 37.
78 *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999.
79 Ibid. at paras 51-52.
80 Ibid. at para 63.
81 *Delta v. France*, ECHR, no. 11444/85, 19 December 1990.

a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings".[82] The Court concluded that "the rights of the defence were subject to such restrictions that Mr *Delta* did not receive a fair trial".[83]

The case law described represents only a part of the condemnations inflicted by the Strasbourg Court to France in relation to its criminal procedure. It was argued that while the ECtHR raised the level of protection of the basic rights every year, France undertook the opposite steps, lowering it each year.[84] However, as discussed below, several measures have been adopted to bring France more in line with the ECtHR jurisprudence.[85]

5. The 1993 and 2000 reforms of the French Criminal Procedure Code

In 1988, the Minister of Justice established the Criminal Justice and Human Rights Commission (the Delmas-Marty Commission) in order to analyse the pre-trial stage and to suggest the necessary measures to be adopted to bring the French criminal system in line with the European Convention. Particular attention was devoted to the development of the rights of suspects.

The Commission addressed, *inter alia*, the passive role that the defence was assigned in the pre-trial procedure (*enquête* and *instruction*) where the suspect was considered as the mere object of the search for the truth led by the state. It stressed the necessity of embracing and incorporating the *principe du contradictoire* in the criminal system, which did not equate to importing the Anglo-Saxon adversarial system, but was intended to guarantee that "each side is entitled to know of other's position and supporting evidence in sufficient detail and with sufficient time to give it a proper opportunity to respond".[86] It was understood that a broader participation on the part of the suspect rather than representing a shift towards an adversarial method would be an essential feature for improved functioning of the inquisitorial search for the truth.[87]

The Commission recommended that the defence be granted the right to ask for further police or judicial investigation, a more encompassing right to access the *dossier*, the right to ask for alternative expert reports, the possibility of attending the judicial hearing and to ask questions as well as the right to challenge evidence unlawfully obtained.[88] These reforms were considered indispensable to ensure a more active and participative approach from the defence in the pre-trial stage. In January 1993, the majority of the recommendations given by the Delmas-Marty

82 Ibid. at para 36.
83 Ibid. at para 37.
84 Marguénaud J.P, *La dérive de la procédure pénale française au regard des exigences européennes*, Recueil Dalloz de doctrine de jurisprudence et de législation: hebdomadaire, 2000, 249-255.
85 Significant reforms have occurred in relation to the *garde à vue* regime whose developments are discussed below.
86 Field S. and West A., *A Tale of Two Reforms: French Defense Rights and Police Powers in Transition*, Criminal Law Forum, Vol. 6, N. 3, 1995, p. 479.
87 Delmas-Marty Commission, Commission Justice Pénale et Droits de l'Homme, *La mise en état des affaires pénales: rapports* (1991).
88 Field and West, above n. 86 at p. 480.

Commission were implemented by Parliament.[89]

For the first time a person detained for questioning (also *garde à vue*) was granted the right to speak with a lawyer after twenty hours of police detention. The attempt to introduce immediate access to a lawyer encountered major resistance. It was contended that it would affect the efficacy of the initial period of investigation by the police, who should remain "virtually untrammeled by defense rights".[90] We will see in the following subsection how the immediate access to a lawyer was later achieved.

The 1993 reform granted the suspect the right to challenge the validity of the investigative acts through an application to the Court of Appeal. This application if upheld would lead to the exclusion of the evidence obtained through that act from the *dossier*.[91] The January reform did not limit such application to the acts performed during the judicial investigation but extended it to the acts undertaken during the *enquête*. This considerable improvement in the defence's right to intervention was subsequently restricted by several amendments.[92] Specifically, where a violation of the suspect's rights was established, the Court of Appeal was granted discretion as to whether to declare evidence inadmissible instead of the automatic mechanism introduced by the 1993 reform.

As far as the *instruction* is concerned, the Delmas-Marty Commission highlighted a considerable imbalance between the prosecutor and the defence in relation to the possibility for the investigating judge carrying out further investigation. In fact, the prosecutor's request could be denied by the *juge d'instruction* only with a motivated decision subject to appeal whereas the defence could only ask the rehearing of a specific witness and such request could be denied with no further explanation. The reform granted the defence the right to ask the investigating judge to perform investigating activities and any denial must now be motivated and is subject to appeal. Most notably, the defence lawyer was granted the right to access the *dossier* no later than four working days before the suspect's first hearing as well as regular access thereafter.[93]

The Commission tried to advocate the necessity of a marked separation between the investigation and the judgment. It suggested the abolition of the role of the *juge d'instruction* transforming the prosecutor in the subject responsible for all the investigations. This proposal was perceived as an unwelcome shift towards the adversarial tradition in which the prosecutor and the defence are (at least theoretically) equal parties to the proceedings and consequently it was not considered.

89 Loi n. 93-2, 4 January 1993. Shortly after, a right wing Executive replaced the socialist Government, which enacted the reforms, and on 24 August 1993 several amendments, adopted through Law n. 93-1013, reduced sensibly the impact of the January Reforms on the development of the rights of the suspect

90 Field and West, above n. 86 at p. 487.

91 So-called regime of *nullité*.

92 Law n. 93-1013, 24 August 1993.

93 Article 114 *code de procédure pénale*. In relation to this issue the law n. 93-1013 of 24 August 1993, while not modifying the four days term redefined the broad right of access to the case file after the first hearing stating that it was subject to the requirement that it would not affect the proper functioning of the magistrate's office.

In January 1997, a *Commission de réflexion sur la justice* was established by President Jacques Chirac. The President of the *Cour de Cassation* was appointed as its chairman. Among other things, the commission was called to tackle the issues of the government influence on the justice system and the incapacity of the latter to safeguard individual rights such as the presumption of innocence.[94] In June 2000 the main points of the commission's report were legislated on by Parliament.[95] The reform introduced a preliminary article affirming that among the main pillars of the criminal procedure there are equality of arms, the presumption of innocence, the right to a defence and the right to know the nature of the charges against someone. In other words, this article states the importance of the implementation of the *principe du contradictoire* in the French criminal procedure.

The rights of a suspect detained by the police for questioning improved. The suspect was granted, from the beginning of his detention, access to a lawyer (although only for thirty minutes) and the right to be informed by the police about his right to remain silent.[96] In relation to the *instruction*, the 2000 reform broadened the defence's right to ask for further investigation extending it to the request to conduct searches, to start an investigation in relation to a third person or to intercept post.[97]

The freedom and detention judge (*juge des libertés et de la détention*) was established and granted the power to decide over the detention of suspects during judicial investigations. This part of the reform brought the French criminal procedure in line with the ECtHR which requires that pre-trial detention decisions must be made by a third judge not involved in the case. The power to hold witnesses in detention during the *instruction* was removed as it had already been done in relation to police investigations as a result of the 1993 reform. The reform reaffirmed the idea (which had inspired the 1993 legislation) that the principle of the equality of arms and the improvement of the defence's rights were not an antithesis to the effectiveness of a criminal investigation but, on the contrary, their affirmation was the right way to guarantee the fairness of the procedure. In other words, they would contribute "ultimately to legitimate the investigation and trial process".[98]

From 2002, a change in governments led to the affirmation of a different approach to criminal justice focusing on crime repression. In March 2003, the law for interior security (*loi pour la sécurité intérieure*) was adopted by Parliament.[99] Amongst other things, it increased police powers and, as mentioned, repealed the police's obligation to inform the suspect of his right to remain silent.

In March 2004, Parliament passed the law on the adaptation of justice to the evolution of crime (*loi sur l'adaptation de la justice aux évolutions de la criminalité*), which focused on the investigation and trial of cases dealing with organised crime.[100] It

94 See Hodgson, above n. 2 at p. 41.
95 Loi n. 2000-516 of 15 June 2000, *Loi renforçant la protection de la présomption d'innocence et les droits des victimes*.
96 This obligation was repealed in 2003 by Law 2003-239, of 18 March 2003, *pour la sécurité intérieure*.
97 See Article 82-1 CPP.
98 Hodgson, above n. 2 at p. 44.
99 Law n. 2003-239, of 18 March 2003, *loi pour la sécurité intérieure*.

strengthened the regime of *garde à vue,* increasing its potential length and further delaying the access to a lawyer, in cases concerning not only drug trafficking and terrorism, as was the case before, but also in cases of extortion, procurement, sequestration and human trafficking, overall making the regime far harsher.[101] Although the provision of the more liberal and rights oriented 2000 reform were not officially repealed, the 2004 legislation diminished their effectiveness.

6. Disclosure in the pre-trial stage

6.1 Introduction

Disclosure of information does not play a predominant role in the above-described French inquisitorial pre-trial stage. A distinction must be made between the police investigation stage, supervised by the prosecutor, and the *instruction*, which is governed by the *juge d'instruction*. It is in the former phase, in fact, that the defendant's rights, among which the right to be informed of the nature and cause of the accusations against him, the right to legal assistance and the right to have access to the case file, are more restricted.

The French code of criminal procedure contains no explicit provisions regulating access to the case file by the suspect or the release of documents to lawyers in relation to the police investigation. In other words, there are no provisions regulating the disclosure of information. The judicial supervision is considered the most efficient guarantee of the suspect's rights. This applies also to the delicate phase of the formation of the *dossier* which occurs through a mainly written procedure where the evidence which will make up the *dossier* is considered reliable due to the documented procedural regularity of the preliminary investigation. Several questions arise from these considerations: does the lack of disclosure affect the suspect's right to defence? What is the role the defence is allowed to play at this stage? And what is the influence, if any, of the defence lawyer in the formation of the *dossier*?
These questions are also much debated in relation to the controversial issue of the *garde à vue,* which, as noted before, allows the police to hold a person in custody who is suspected of the commission of a criminal offence but not yet charged and needs to be available for the purposes of the investigation.

The first subsection addresses the defence's rights during the investigation as well as during the *garde à vue*. The latter is first considered in its regulation before the legislative intervention of 2011 and 2014.[102] The second subsection provides an overview of the jurisprudence of the European Court of Human Rights on the *garde à vue* followed by an account of the reform of the *garde à vue* regime given in the third subsection. This *iter* allows the changes that occurred regarding the defence's

100 Law n. 2004-204, of 9 March 2004, *loi sur l'adaptation de la justice aux évolutions de la criminalité.*
101 See Hodgson, above n. 2 at p. 58.
102 Consequently references to the articles of the code of criminal procedure in this paragraph must be intended to refer to the code as it stood before the intervened reforms of 2011 and 2014 analyzed below.

right to be informed while in custody and the contributions from the Strasbourg Court and the European Union to this development to be appreciated. Finally an analysis of the disclosure of information during the *instruction* is provided in the last subsection to conclude the description of the disclosure of information in the pre-trial stage.

6.2 Disclosure during police investigation and the garde à vue regime

French criminal procedure does not envisage an active participation by the defence lawyer in the ongoing investigation and in the formation of the *dossier*. The defence lawyer's observations are inserted into the case file but their effectiveness is rather limited. The lack of access to the *dossier* and the scarce information disclosed on the nature of the offences prevents the lawyer from creating a more responsive defence strategy from the first meeting with his client. He must rely on the information provided by the suspect without any knowledge of the material gathered by the police.

As far as early legal representation of the suspect is concerned, it is worth mentioning the 2003 EU Commission green paper on "Procedural Safeguards for Suspect and Defendants in Criminal Proceedings throughout the European Union".[103] In this paper, the European Commission concluded that while all the rights that make up the concept of "fair trial rights" were important, some rights were so fundamental that they should be given priority. First among these was the right to legal advice and assistance. If the accused has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights. Furthermore, it stated that the right to legal representation arises immediately on arrest and that the suspect has the right to have his counsel present at the questioning and interview during the proceedings.

The *Cour de Cassation* established a working group to respond to the questions posed by the green paper. The working group recommended allowing counsel intervention as soon as a person is informed of being suspected of the commission of a criminal offence. It also stressed that the defence counsel should be granted access to the case file at every stage of the proceedings. The working group specified that "the right to genuine assistance from a lawyer should not be reduced to just an interview as currently established under French custody law, particularly at the start of the measure. This interview, which is limited to thirty minutes, mainly aims to protect individual freedoms and provide psychological support to the person held in custody. It in no way enables them to exercise genuine 'rights to defence', which, in order to be effective, are required by the European Court not

[103] EU Commission green paper on "Procedural Safeguards for Suspect and Defendants in Criminal Proceedings throughout the European Union", 19 February 2003, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0075:FIN:EN:PDF. It examines whether it is appropriate and necessary to introduce in the Member States of the EU common minimum standards for procedural safeguards for persons suspected or accused of, and prosecuted or sentenced for, criminal offences. It defines these minimum standards and the areas in which they will be applicable.

only at the beginning when the indictment is notified but also to be part of an organized strategy and to be implemented each time that the person is questioned, confronted with witnesses or when a court decision is made that he could appeal against".[104]

Despite these important recommendations, the *garde à vue* remained a grey area in which the suspect was not adequately informed, had little due process rights as envisaged by the European Convention and could not benefit from effective supervision by the prosecutor who is supposed to safeguard the defence's rights. The police discretion is predominant at this stage. The idea of the *dossier* built up "on the basis of a real dialogue between the prosecutor and defence with the latter using a reading of the *dossier* and client interview to prompt the prosecutor to order further investigations was a long way from reality".[105]

The police can hold any person against whom there is one or more plausible reasons to suspect that they have committed or attempted to commit an offence. The *Procureur de la République* must be informed of the beginning of the *garde à vue.*[106] While the person in custody may not be held for more than twenty-four hours, the detention may be extended for a further period of up to twenty-four hours through written and justified authorisation by the *procureur de la République*.[107] Furthermore, in case of exceptionally serious offences such as offences related to organised crime, police detention can last up to ninety six hours. The law of 23 February 2006 authorised, in cases concerning terrorism, the *gard à vue* to last up to six days.

As far as the disclosure of information to the suspect is concerned, the regulation of the *garde à vue* raised several concerns which were mostly related to the poor quality of the information received by the suspect and the rather limited and ineffective legal assistance he was allowed to have.

For instance, Article 63-1 CPP stated that a person placed in police custody must be informed of the nature of the offence being investigated. This provision, although rather generic in its formulation, marked the first, albeit limited, disclosure of information towards the suspect during the proceedings. In addition, the suspect has the right to inform somebody of his detention and to ask for medical examination.[108] The suspect was not informed of his right to remain silent.

In relation to access to legal representation, Article 63-4 stipulated that at the beginning of his detention the suspect could ask to talk to a lawyer. However, the meeting could not last longer than thirty minutes and the counsel, although informed about the nature and the presumed date of the offence, had no right of

104 Court of Cassation, Documentation and Research Department, Observatory of European Law, working group on the *Commission Green Paper* "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union", JAI/413/03-EN.
105 Field and West, above n. 86 at p. 295.
106 Article 77 *code de procédure pénale.*
107 Article 63 *code de procédure pénale.*
108 Articles 63-2 and 63-3 *code de procédure pénale.*

access to the case file.[109] Therefore, while the defence lawyer has enjoyed the right to study the content of the *dossier* during the *instruction* since 1897, he is still precluded from accessing it during the police investigation.[110]

In cases related to organised crime, a suspect is only allowed access to a lawyer after forty-eight hours and in cases concerning terrorism and drug trafficking (also where the suspect is a minor) after seventy-two hours. This provision seems to be in conflict with Strasbourg case law affirming that the refusal of access to a lawyer for forty-eight hours for a person arrested for terrorist offences constitutes a violation of the European Convention.[111] However, in 2004, the Constitutional Council did not quash the provisions regulating the delayed access to a lawyer in cases concerning grave offences.[112] In this framework, the duty of the police to inform the suspect about his right to remain silent was repealed. The right still exists but the suspect must know of it himself or be informed by his counsel once he has intervened.

Another much debated aspect of these provisions is that the lawyer was not entitled to assist at the questioning of his client. This is in line with the idea that the lawyer discharges his function by providing the suspect with moral support and general legal advice about his rights and assessing whether they have been respected or not. The lawyer performs a check on the legality of the investigation and detention. Anything that goes beyond this conception is perceived as an undue imbalance in favour of the suspect. In 2007, an amendment to the code of criminal procedure introduced article 64-1, which regulated the audiovisual recording of the questioning only in relation to cases concerning *crimes*.[113] The registration cannot be consulted unless there are challenges on the content of the written statement related to the interrogation. In this case, it is the *juge d'instruction* who decides on the application of the parties.

On 30 July 2010 the *Conseil d'État* found several provisions of the code of criminal procedure regulating the *garde à vue* to be in violation of the Constitution.[114] Specifically, it found the application of the police detention, and its extension after the first twenty-four hours unconstitutional, regardless of the seriousness of the offenses as regulated under article 63 and 77 of the CPP.
Moreover, the judgment targeted the restricted legal assistance available to the suspect stating that it "does not allow the person undergoing questioning, and held against his will, to have the benefit of effective assistance from a lawyer".[115] This restriction on the rights of the defence was imposed in a general manner, without

109 Article 63-4 *code de procédure pénale.*
110 Hodgson J., *The Detention and Interrogation of Suspects in Police custody in France*, European Journal of Criminology, 2004, Vol. 1(2): 163-199, p. 174.
111 *John Murray v. UK,* ECHR, [GC], no. 18731/91, 8 February 1996.
112 Constitutional Council, Decision n° 2004-492 DC, 2 March 2004.
113 Law n. 2007-291, 5 March 2007. On this point see the judgment of the Conseil Constitutional n. 2012-228/229 delivered on 6 April 2012. The Court found article 64-1 not in line with the Constitution insofar as it excluded the registration in cases regarding organized crimes as well as in cases involving an attack to the fundamental interests of the Nation.
114 Constitutional Council, Decision n. 2010-14/22 QPC of 30 July 2010. Available in English at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/decisions-of-the-constitutional-coucil-qpc.48658.html. Specifically the provisions in questions were articles 62, 63, 63-1 and 77 together with article 63-4 (paragraphs 1 to 6).
115 Constitutional Council, Decision n. 2010-14/22 QPC of 30 July 2010, para. 28.

any consideration of particular circumstances in order to collect or conserve evidence or ensure the protection of persons. "The person remanded in police custody is moreover not informed of his right to remain silent".[116]

The *Conseil d'État* went on stating that in such conditions, the provisions regulating the *garde à vue* do not offer suitable guarantees as to the use made of remands in police custody.[117] It found that the reconciliation of the need to prevent disruption of public order and to pursue the offenders and the need to guarantee the effectiveness and exercise of the constitutional freedoms could not be considered balanced (*ne peut plus être regardée comme équilibrée*). "Hence these provisions fail to comply with Articles 9 and 16 of the Declaration of 1789 and must therefore be held to be unconstitutional."[118]

Following this judgment, also the Court of Cassation on 19 October 2010 stated the non-compliance of the *garde* à *vue* regime with the European Convention on Human Rights. However, like the *Conseil d'État,* it agreed that the consequences of its findings should be suspended until July 2011 to give time for Parliament to make the necessary changes to the code of criminal procedure.

6.2.1 The ECtHR and the garde à vue

On 14 October 2010, the European Court of Human Rights delivered its judgment in the case of *Brusco v. France*, in which it analysed the *garde à vue* regime and its compatibility with the provisions of Article 6 of the European Convention on Human Rights.[119] It concluded that the *garde à vue* regime violated article 6(1) and (3) of the Convention.
The case concerned an individual, named B.M., who was attacked by two hooded men in an underground car park in Paris in December 1998. Mr. Brusco was questioned by the police in relation to the assault as the victim had reported the assault claiming that his wife and Mr. Brusco (who, according to him, were having an affair) had hired the aggressors to attack him.

Mr. Brusco was suspected of being the mastermind of the aggression and consequently, on 7 June 1999 at around 6 p.m., Mr. Brusco was stopped and taken into police custody where he was made to swear "to tell the truth and nothing but the truth". Witnesses could be asked to do so according to article 153 of the code of criminal procedure.[120] Mr. Brusco confessed his involvement in the assault admitting to have paid the two aggressors €15,000 in order to scare B.M. with the aim of making him leave his wife. He denied having asked them to physically attack B.M.

116 Ibid.
117 Ibid. at para. 29. The judgment referred to Articles 62, 63, 63-1, 63-4 paragraphs 1 to 6 and Article 77 of the Code of Criminal Procedure.
118 Ibid. at para. 29.
119 *Brusco v. France*, ECHR, no. 1466/07, 14 October 2010.
120 The Law of 9 March 2004 amended article 153 of the criminal procedure code removing the obligation for a person in police custody under a warrant issued by an investigating judge to give evidence under oath.

Mr. Brusco was allowed to see his lawyer only at the end of his interrogation on 8 June 1999 at around 2 p.m. He was then placed under investigation for aiding and abetting attempted murder, and remanded in custody. His application to have the records of his interrogation repealed were all dismissed on the ground that it was legitimate to question him as a witness and making him swear on oath. Mr. Brusco was sentenced to five years imprisonment. The Appeal Court and the Court of Cassation upheld the judgment.

Before the ECtHR, the applicant claimed that he had been compelled to take an oath before being questioned and that his right to remain silent and not to incriminate himself had been violated by the procedure followed during the *garde à vue*. The Court first recalled the importance of the right to remain silent and of the right against self-incrimination which are generally accepted international legal principles and fundamental elements of the right to a fair trial. The Court noted that the government's argument that Mr. Brusco was merely a witness at the time of his interrogation (this being the reason why he had been asked to swear on oath) was not grounded. It stressed that having being indicated by one of the aggressors as the mastermind of the operation, he was considered by the authorities as a suspect and not a mere witness. When he was taken into custody and asked to swear on oath, there were already criminal charges against him (in the autonomous meaning of the Convention), therefore Mr. Brusco had the right to remain silent and not to incriminate himself pursuant to article 6(1) and (3).

Mr. Brusco's conviction had been based mainly on the admissions he made when questioned by the police under oath and without the presence of his lawyer. The Strasbourg Court acknowledged that the situation and the threat of criminal proceedings for perjury had put the applicant under pressure. He had not been informed of his rights at the beginning of the interrogation and he had been allowed the legal assistance only after twenty hours in police custody. Consequently, his lawyer could not remedy this lack of information on the part of the authorities. The Court concluded that under these circumstances an infringement of the applicant's rights to remain silent and not to incriminate himself had occurred in violation of article 6(1) and (3) of the European Convention. France did not appeal the judgment that became final.

6.2.2 The Parliament's response

On 14 April 2011, Parliament passed law n. 391/2011, which adopted significant changes in the *garde* à *vue* regime in accordance with the findings of the judgments of the ECtHR, the *Conseil d'État* and the Court of Cassation.

Interestingly, law n. 391/2011, should have entered into force no later than 1 July 2011. However, the Court of Cassation, sitting as a full court, ruled on 15 April 2011 that the findings of the ECtHR in the case of *Brusco v. France* should be relied upon immediately. Consequently, suspects should be granted the presence of a lawyer during the entire duration of the *garde* à *vue*. The Court of Cassation stated

that waiting for legislation to enter into force would leave France in breach of the European Convention on Human Rights. Following this judgment, the Government announced that the provisions of the law n. 391/2011 would have been applied immediately. As a direct consequence of these developments, a suspect gained the right to be assisted by counsel throughout his *garde* à *vue*.

In addition, law n. 391/2011 provides that a person placed in custody shall be informed forthwith that he enjoys the right to make statements, to answer the questions asked or to remain silent. Moreover, it significantly changed the conditions of intervention by the lawyer during custody, the lawyer being able to attend the hearings and crossexaminations of the person in custody.[121] Finally, it stipulated that a suspect cannot be convicted solely on the basis of the statements he has made while in police custody if not assisted by a lawyer.

The Committee of Ministers of the Council of Europe, which monitors the execution of the judgments of the European Court of Human Rights, assessed the provisions introduced through law n. 391/2011 in the *garde à vue* regime in relation to the *Brusco* judgment and it considered such measures sufficient for preventing a similar violation of the Convention from occurring.[122]

In addition to this, on 28 May 2014 law n. 535 was published in the official journal of the French Republic. This instrument held the necessary provisions for complying with the EU directive on the right to information in criminal proceedings of May 2012.[123]
The EU directive highlights the importance of procedural rights for suspects and accused persons deprived of their liberty (within the meaning of Article 5(1)(c) of the European Convention of Human Rights) in order to safeguard the fairness of the proceedings. Among these rights, the right to be informed of the criminal act they are suspected or accused of having committed is crucial.

The directive states that information on applicable procedural rights should be given promptly by means of a written letter of rights drafted in an easily comprehensible manner so as to assist the persons held in custody in understanding their rights. The document should include basic information concerning any possibility of challenging the lawfulness of the arrest, obtaining a review of the detention or requesting provisional release where such a right exists in national law. Access to material evidence should be granted to the suspects or accused persons but it can be refused, in accordance with national law, where such access may lead to the endangerment of another person or where the refusal is necessary to safeguard ongoing investigation.

By the adoption of law 535 the French Parliament created a statute of rights for suspects during investigations also envisaging the possibility of questioning them

121 See Articles 63 code de procédure pénale.
122 Resolution CM/ResDH(2011)209, adopted by the Committee of Ministers of the Council of Europe on 2 December 2011 at the 1128th Meeting of the Ministers' Deputies.
123 Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, published on the official journal of the European Union on 1 June 2012.

without placing them in *garde à vue*.
Persons heard freely cannot be questioned before they are specifically informed of the date, qualification and place of the offense they are suspected of having committed, of their right to leave the premises or to remain silent as well as to have an interpreter. If the crime is punishable by imprisonment, they will also be informed of their right of access to a lawyer.[124] They will receive a written document outlining their rights and have the same access to the dossier as is granted to their lawyer.[125]

This law also improves the rights of persons held in *garde à vue*. Specifically, the person held in custody must be informed immediately, by the police officer, in a language that he understands, of the duration of the measure and its possible extensions, of the offence he is suspected of having committed (including the date and the place), of the right to be examined by a doctor at the beginning and at the end of the custody as well as of the right to inform a relative and his employer and, in case of foreign nationals, the consular authorities of the State of which he is a national. Moreover, at the beginning of the procedure, the suspect is informed of his right to be assisted by a lawyer of his choice or by duty counsel, to be assisted by an interpreter, to remain silent during the hearings and to make representations to the judge who decides on the extension of his custody, in order to put an end to the measure. A document outlining these rights is given to the person upon notification of the *garde à vue*.

In relation to the access to the dossier during the *garde à vue*, we have seen how the framework did not contemplate such a possibility. It is interesting to underline how in the context of the intervened reform, during the first reading in the National Assembly, an amendment was adopted to allow the person in *garde à vue* and his lawyer access to the file. However, this amendment was not accepted and the access to the file remains possible only after the indictment.

6.3 Disclosure during the instruction

French criminal procedure is more prone to grant defence rights once a suspect is *mise en examen* by an investigating judge rather than from his arrest. This moment marks a turning point at which the defence can play a more active role. During the *instruction* the defence lawyer is granted access to the *dossier* putting him in the position to elaborate with his client a more comprehensive strategy for defence in response to the evidence gathered against him. Article 114 CPP states that the interrogation of the accused person can take place only in the presence of a lawyer who is summoned to appear at least five days before the scheduled date and importantly, the case file is put at his disposal at least four working days before each interrogation of the person under judicial examination. From this moment onwards, the defence counsel is able to evaluate the content of the case file

124 The entry into force of the right to counsel is 1 January 2015.
125 Article 61-1 *code de procédure pénale*.

comparing his client's account of events with the statements and material gathered in the *dossier*. The case file remains at the disposal of the counsel after the first appearance of his client compatibly with the exigencies of the magistrate office.

Article 114 CPP further provides that the defence lawyer has the right to obtain a copy at his own expense of any or all of the documents and instruments contained in the case file. The suspect's effective and direct knowledge of the evidence gathered in the case file is subject to a judicial filter. The code of criminal procedure in fact, states that the defence lawyer must apply to the investigating judge indicating the documents he intends to transmit to his client in order to be authorised to do so. The *juge d'instruction* has five days to dismiss the application based on a specially reasoned order in respect of the risks of pressure on the victims or on other parties to the proceedings. The decision is open to appeal within two days from its notification to the president of the investigating chamber.[126]

Article 116 of the CPP regulates the first appearance (*première comparution*) and the interrogation of the person under investigation. Usually the first appearance takes place shortly after the end of the *garde à vue* and once the suspect has been presented to the prosecutor. The interrogation must take place before any decision to charge is taken by the *magistrat*. At the first appearance of the suspect, the *juge d'instruction* informs him of each of the charges laid against him and for which placement under judicial examination is contemplated, specifying their legal qualification. Furthermore, the suspect is informed of his right to remain silent, to make a statement, or to be interrogated. The consent to be interrogated at the first appearance can be given only in the presence of the defence counsel who can present his observations to the investigating judge. When the suspect is still without the assistance of a lawyer the *juge d'instruction* informs him of his right to appoint one or to have a duty counsel. The advocate may consult the case file and communicate freely with his client.[127] The investigating judge is in charge of interrogation, confrontations and hearings. The district prosecutor and the advocates acting for the parties may ask questions or make brief observations.[128]

In many cases during police custody the duty counsel will most likely be replaced before or shortly after the *première comparution*. This means that the lawyer, whose access to the *dossier* takes place weeks after his client is arrested, may have to face substantial admissions made by him during police custody. This changes the approach to the case file, which was formed without any the defence counsel's involvement. The latter in fact will have no other option than look for potential discrepancies among the statements in the *dossier* in order to undermine its credibility at trial. The defence lawyer will present the best possible reading of the evidence gathered in the *dossier* at the trial rather than adding new favourable evidence. In other words, the defence counsel and his client "are primarily

126 In relation to both applications, where there is no response within the assigned time limit (five and two working days respectively) two, the advocate may give his client the copy of the documents or acts mentioned on the list.
127 Article 116 *code de procédure pénale.*
128 Article 120 *code de procédure pénale.*

reacting to a *dossier* the basic lines of which have already been established".[129] The developments in the regulation of the *garde à vue* regime, as described above, can contribute to improving the defence's position insofar as it limits the possibility of having incriminating statements given by the suspects in the absence of his lawyer.

7. Disclosure at the Assize Court

When the decision to indict the defendant has become final, the accused, if detained, is transferred to the prison where the competent Assize Court sits.[130] There the President of the Court interrogates him as soon as possible following his arrival at the prison. The *dossier* and the documents are transferred to the court office.[131] The President checks that the accused has received a copy of the indictment. The accused can communicate freely with his lawyer who enjoys full access to the *dossier* having the right to examine any part of it as long provided it does not delay the proceedings.[132]

Article 279 CPP states that the accused must be given a copy of the records establishing the offence, the written statements of witnesses as well as the expert reports. In addition, the accused and the civil party or their advocates may take a copy or have a copy taken of all the procedural documents at their own expense.[133] The jurisprudence has adopted a restrictive reading of these provisions stating that their violation does not cause the nullity of the procedure but only the right of the accused to ask for an adjournment of the hearing if his defence has been affected.[134]

The parties are bound to disclose to one another the list of the witnesses they intend to call to testify as soon as possible and in any case no later than twenty-four hours before the hearing.[135] The same rule applies to the names of the experts called upon to report on the tasks entrusted to them in the course of the investigation.[136] Each party can oppose the admission of a witness' testimony not mentioned in the list. The Court disposes of the application. However, the President of the Court may order that a witness is heard as a source of information although not mentioned in the witness list.[137]

The analysis of these provisions regulating disclosure during the trial shows that when the proceedings reach the trial stage a more adversarial approach, based on the *principe du contradictoire*, permeates the procedure.

129 Field and West, above n. 86 at p. 295.
130 Article 269 *code de procédure pénale.*
131 Article 272 *code de procédure pénale.*
132 Article 278 *code de procédure pénale.*
133 Article 280 *code de procédure pénale.*
134 Crim., 24 mars 1971, B.C., n. 106; 29 juin 1983, B.C., n 206, in Pradel J., *Procédure Pénale*, 13th Edition 2006/2007, Editions Cujas, 2006 p. 821.
135 Article 281 *code de procédure pénale.*
136 Article 281 *code de procédure pénale.*
137 Article 330 *code de procédure pénale.*

8. Concluding remarks

Disclosure, intended as the suspect's right to be informed of the accusations and the evidence gathered against him, is a concept that seems to conflict with the inquisitorial nature of the pre-trial stage of the criminal proceedings. The same observation applies to the defence's constructive role in the formation of the *dossier*. The latter assumes a crucial importance in the further stages of the proceedings where it is relied upon almost completely.

The French criminal law system experienced difficulties in finding the balance between the fair trial rights granted by the European Convention and its inquisitorial pre-trial stage. The current solution lies with the judicial supervision of the prosecutor, which is conceived as an adequate guarantee of the suspect's rights. Proposed steps towards a more incisive participation for the defence lawyer are perceived as threatening the effectiveness of this delicate phase due to its adversarial character.

To a third party, it may appear that although the *instruction* stage marks an improvement in the defence's involvement, the lapse of time between the arrest of the suspect and the moment when his lawyer can have access to the *dossier* affects the effectiveness of his counsel. In this context, an improvement in the quality of information given to the suspect during his custody as well as the right to be assisted by counsel during the interrogation are welcome steps.

The research conducted shows that the trial stage presents a more "adversarial" take on the rights of the accused. Full disclosure of the case file and the exchange of the witness lists allow each party to have a clear picture of the material gathered and of the other side's strategy. The question is to what extent this openness can be effective when it takes place in the final stage of the proceedings where the *dossier* has already been formed.
A more active role for the defence, possibly based on its involvement in the formation of the case file as well as on an earlier access to the *dossier,* could assist in bringing the system more in line with the standards of the European Convention. Steps in this direction are also important considering the increasing number of cases that are disposed of through procedures used as an alternative to the *instruction* (especially by *comparution immédiate*). This trend can, in fact, jeopardise the defence's rights during police investigation as a result of the difficulty faced by the prosecutor in effectively supervising each case.

These changes, which imply a substantial reform of criminal procedure, would provide more legitimacy to the inquisitorial pre-trial stage in the public's eyes. The reforms that have been implemented so far have brought the procedure in line with the ECtHR jurisprudence. However, the implementation of more significant and radical "cultural and material changes"[138] have been resisted by the professional culture amongst the figures involved in the criminal procedure.

[138] Field S. and West A., *Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process*, Criminal Law Forum, 2003, Vol. 14, p. 314.

IV. Article 6 of the European Convention of Human rights: The Right to a Fair Trial

Introduction

Article 6 of the European Convention for the Protection of Human Rights and Individual Freedom, also known as the right to a fair trial, occupies a predominant position within the Convention. It is the most frequently invoked right[1] in the applications filed to the European Court of Human Rights and formerly to the European Commission of Human Rights (hereafter Commission).[2]

The right to a fair trial is also an essential element of every other substantial international instrument devoted to the protection of human rights. It is embodied, *inter alia*, in article 14 of the International Covenant on Civil and Political Rights and Fundamental Freedoms (ICCPR), Article 8 of the American Convention on Human Rights (ACHR) and article 10 of the Universal Declaration of Human Rights (UDHR).

This chapter analyses the provisions of Article 6 of the European Convention in light of the ECtHR's jurisprudence, which has provided a substantial contribution to their interpretation and evolution. This scrutiny, in line with the focus of this book, will be limited to the application of Article 6 regarding criminal trials. Furthermore, the study focuses on the provisions of Article 6 that have a direct or indirect connection with the disclosure of evidence, which is the focus of this research. Article 5 of the Convention and the pre-trial stage are briefly touched upon in order to understand the implications that the right to a fair trial has at this delicate stage of criminal proceedings. More specifically, an attempt is made to underline the applicability of Article 6, in whole or in part, to segments of the proceedings prior to the commencement of the trial.

The application of Article 6 of the European Convention to disclosure will be discussed in detail in the following chapter.

1. General outline of the right to a fair trial

Article 6 of the Convention reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the

1 Harris D.J., O'Boyle M. & Warbrick C., Law *of the European Convention on Human Rights*, Oxford University Press, 2014, p. 417.

2 The European Commission of Human Rights was abolished in 1998 when Protocol 11 entered into force, allowing individual applications to be lodged directly with the European Court of Human Rights. Until then the Commission had functioned as a filter, evaluating the admissibility of individual applications and filing cases that were considered grounded to the Court on behalf of the individual.

interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The right to a fair trial originates from Article 10 of the United Nations Universal Declaration of Human Rights ("Declaration"), which states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[3] The text of Article 6(1) of the Convention resembles the definition of the UN Declaration although it goes further and lists a more complete set of rights. This results from the success of the British approach during the negotiations of the text based on a more detailed definition of the rights of the Convention, over the civil law approach, which aimed for a general definition of the guarantees whose development would have been delegated to the jurisprudence of the Commission and the Court.[4]

The guarantees in Article 6 of the Convention are of a procedural nature and so they are aimed at providing procedural and not substantive justice.[5] The main purpose of Article 6 of the Convention is to establish a standard of fairness for the defendant that must be followed in every criminal trial.

The ECtHR does not act as a court of fourth instance. The Court does not assess the fairness of the outcome of a case as determined by a domestic jurisdiction, but it analyses the overall fairness of the procedure followed to reach that outcome (this approach is known as the "fourth instance doctrine"). The ECtHR has consistently pointed out that it is not its duty "to deal with errors of fact or law allegedly

3 United Nation Universal Declaration of Human Rights, 10 December 1948, article 10.
4 See Jackson John D., *The Effect of Human Rights on Criminal Evidentiary Process: Towards Convergence, Divergence or Realignment?*, The Modern Law Review, 2005, 68 (5), pp. 737-764.
5 For the opposite argument see Loucaides L.G., *Questions of Fair Trial Under the European Convention of Human Rights*, Human Rights Law Review, 3 (2002) 27.

committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention".[6]

Article 6 of the Convention can be broadly divided into a general first part (paragraph 1) concerned, *inter alia*, with the right to a fair hearing (and its requirements) in criminal and civil matters and a second, more specific part which guarantees the presumption of innocence (paragraph 2) and the rights of the defence (paragraph 3) in criminal proceedings. The presumption of innocence granted in paragraph 2 and the various "minimum rights" listed in paragraph 3 are constituent elements of the concept of a fair trial.[7] In sum, paragraph 3 of Article 6 "contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1). The relation between paragraphs 1 and 3 of Article 6 of the Convention is that of the general to the particular".[8] The list in paragraph 3 is non-exhaustive and therefore a trial could still not meet the conditions of fairness of Article 6(1) even when all the rights of paragraph 3 have been respected.[9] The guarantees embodied in Article 6(3) exemplify the notion of a fair trial and must be interpreted in the light of the function they have in the framework of the whole proceedings.[10]

The goal of the Court, when deciding on an application concerning article 6 remains to "determine whether the proceedings considered as a whole were fair as required by Article 6 para. 1".[11] However, when a case concerns a specific guarantee regulated in Article 6(2) and (3) the Court can assess the circumstances of the case under that specific guarantee alone, or in conjunction with Article 6(1), or only in relation to Article 6(1) when the applicant complains that the entire proceedings were unfair.[12] The Court appears to favour the second approach, often declining to decide on a case only on the specific guarantees of paragraph 3. The Court in fact, tends not to analyse whether or not one or more of the specific minimum rights has been violated, "but to combine at the outset the specific guarantees with the general right to a fair trial and to deal with them together without proper distinction".[13]

The ECtHR has made consistent reference to the principle of the equality of arms and to the right to an adversarial trial when defining the right to a fair trial in its jurisprudence. Specifically, the Court stated in multiple judgments that "the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial".[14] The principle of equality of arms means that each party to the

6 *Garcia Ruiz v. Spain*, ECHR, [GC], no. 30544/96, 21 January 1999, para. 28.
7 *Deweer v. Belgium*, ECHR, no. 6903/75, 27 February 1980, para. 56.
8 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, para. 54.
9 Ibid.
10 *Can v. Austria*, European Commission of Human Rights, no. 9300/81, 12 July 1984, para. 48.
11 *Barbera, Messegue and Jabarado v. Spain*, ECHR, no. 10588/83, 6 December 1988, para. 68.
12 See Harris, O'Boyle & Warbrick, above n. 1 at p. 409. See among others, *Isgró v. Italy,* ECHR, no. 11339/85, 19 February 1991 para. 31.
13 Trechsel S., *Human Rights in Criminal Proceedings*, 2006 Published to Oxford Scholarship on line available at http://www.oxfordscholarship.com/oso/public/content/law/9780199271207/toc.html, p. 87. See among others, *Isgró v. Italy,* ECHR, no. 11339/85, 19 February 1991, para. 31.
14 *Brandstetter v. Austria*, ECHR, no. 11170/84, 28 August 1991, para. 66. See also *Belziuk v. Poland, ECHR, no. 23103/93, 25 March 1998*, para. 37; *Jasper v. The United Kingdom*, ECHR, [GC], no. 27052/95, 16 February 2000, para. 51; *Rowe and Davis v. The United Kingdom, ECHR, [GC], no. 28901/95, 16 February 2000*, para. 60; *P.G. and J.H. v. The United Kingdom, ECHR, no. 44787/98, 25 September 20011*, para. 69; *GB v. France*, ECHR, no. 44069/98, 02 October 2001, para. 56.

proceedings must "have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[15] The right to an adversarial trial in a criminal case means, "that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party".[16]

2. Article 6 (1) and (2) of the European Convention of Human Rights

The first paragraph of Article 6 guarantees a person the right to a fair and public hearing, in the determination of any criminal charge against him. The hearing must take place within reasonable time and it must be held before an impartial and independent tribunal established by law.

It goes beyond the scope of this book to undertake a complete analysis of this part of Article 6 of the Convention. What is relevant, as regards the disclosure of evidence, is the interpretation offered by the Convention organs of the notion of "criminal charge". The "criminal" connotation of a charge relates to the scope of the provisions of Article 6 whereas the interpretation of the notion of "charge" determines the point at which Article 6 of the Convention can be invoked.

From reading the preparatory works of the Convention, it emerges that this definition did not create substantial discussion, as the drafters understood it to be self explanatory. It has been the Court by means of its jurisprudence to give an interpretation of this notion. The Court has developed an independent definition of the meaning of "criminal charge" that applies autonomously and irrespective of each government's domestic definition. It did so in order to avoid reliance on the definition given by the state parties to the Convention, which in turn would have conditioned its jurisdiction.

The ECtHR explained the *ratio* behind the adoption of an autonomous meaning of criminal charge stating that "if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6....would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6....to satisfy itself that the disciplinary [offence] does not improperly encroach upon the criminal".[17]

In relation to the "criminal" aspect of the charge, the Court established three criteria to be taken into account to decide whether a person is "charged with a

15 *De Haes and Gijsels v. Belgium*, ECHR, no. 19983/92, 24 February 1997. See also *Ankerl v. Switzerland, ECHR, no. 17748/91, 23 October 1996*, para. 38; *Helle v. Finland, ECHR, no. 20772/92, 19 December 1997*, para. 53; *Krčmář and Others v. The Czech Republic*, ECHR, no. 35376/97, 3 March 2000, para 39.

16 *Brandstetter v. Austria*, ECHR, no. 11170/84, 28 August 1991.

17 *Engel and Others v. The Netherlands*, ECHR, no. 5100/71, 8 June 1976, para. 81.

criminal offence" for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring".[18] A charge is therefore criminal if the state concerned classifies it as such in its judicial system. However, this criterion operates only in one direction as the Court is not bound by the national classification of a charge as not being criminal. In other words, the ECtHR can find Article 6(1) to be applicable to cases concerning charges that are classified as disciplinary or administrative in the domestic jurisdiction of the state concerned. In such cases, the other criteria mentioned will guide the Court in determining the criminal nature of a charge.

As far as the interpretation of "charge" is concerned, in *Deweer v. Belgium*, the Court found that it could correspond to "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[19] This seems to be a rather formal definition, linked to the delivery of an official communication to the person concerned. However, in the same case the ECtHR held that the applicant could be considered charged, under the specific circumstances of that case, from the moment at which the prosecuting authorities, in the absence of an official notification from the incumbent prosecution, had made him an offer of settlement. This offer had been formulated to the suspect in the course of an inspection that "was not performed within the context of the repression of crime".[20]

The Court further recalled that the Commission had already adopted, in several decisions and opinions, a test that seems to be closely related, namely whether "the situation of the [suspect] has been substantially affected" (*répercussions importantes sur la situation du suspect)*.[21] In *Foti and Others v. Italy*, the Court adopted the same definition holding that the existence of a charge is not necessarily always dependent on the official notification but "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect".[22] The Court did not always employ the word "likewise" in decisions concerning the same legal issue.[23]The ECtHR therefore opted for an interpretation of the term "charge" referred to in Article 6(1) as substantive, rather than formal in nature.[24] This approach enables the Court to look behind appearances and investigate the realities of the procedure in question.[25]

The departure of the ECtHR from a formal interpretation of a charge linked to the official notification prevents state parties from intentionally delaying the

18 *AP, MP and TP v. Switzerland*, ECHR, no. 19958/92, 29 August 1997, para. 39.
19 *Deweer v. Belgium*, ECHR, no. 6903/75, 27 February 1980, para. 46.
20 Ibid. at paras. 42-46.
21 Ibid. at para 46. The Court quoted the following Commission's decisions: *Neumeister v. Austria*, European Commission of Human Rights, no. 1936/63, 27 May 1966, p. 81, *Huber v. Austria*, European Commission of Human Rights, no. 4517/70, 8 February 1973, *Hätti v. Federal Republic of Germany*, European Commission of Human Rights, no. 6181/73, 20 May 1976.
22 *Foti and Others v. Italy*, ECHR, no. 7604/76, 10 December 1982, para. 52.
23 See Peçi I., *Sounds of Silence*, Wolf Legal Publishers, 2006, p. 43, footnote 35. See *Eckle v. Germany*, ECHR, no. 8130/78, 15 July 1981, para. 73, where the ECtHR stated that the definition of charge given by the Convention also corresponds to the test whether "the situation of the [suspect] has been substantially affected". The word likewise was not employed.
24 *Deweer v. Belgium*, ECHR, no. 6903/75, 27 February 1980, para 44.
25 Ibid.

official lodging of a criminal charge in order to postpone in time at which the reasonable time element of Article 6 begins to run. At the same time, it allows a better appreciation of the nature of each case. On the other hand, the advantage of the official notification is to have a fixed and precise date, easily to single out in each case, from which article 6 operates, whereas the substantive approach to the term charge lacks such precision and requires a case by case determination of the relevant point in time.

The "substantially affected" or "likewise substantially affected" test leads to a question that needs to be answered: under what circumstances can the situation of an individual be considered "substantially affected"? The Court found that that this can happen "on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened".[26] The right to a fair trial is a crucial right in the context of a democratic society and therefore the Court's broad interpretation of it makes it applicable to cases in which, although the authorities have not notified the charges, the situation of the person concerned has been nonetheless affected in a substantial manner by other measures addressed to him.

The above test relates to the point in time from which Article 6 (1) can be invoked whereas, as is discussed throughout the course of this chapter, the Court has elaborated a different test to determine which of the specific guarantees of Article 6(3) and to what extent they can be applied to the pre-trial stage. However, it must be mentioned that in *Lutz v. Germany* the ECtHR analysed the case on the basis that "in using the terms "criminal charge" (*accusation en matière pénale*) and "charged with a criminal offence" (*accusé d'une infraction*) the three paragraphs of Article 6 referred to identical situations".[27] According to these bases, the "substantially affected test" could be applicable to test the applicability of Article 6 as a whole. Trechsel contends that this definition (the situation of the individual has been substantially affected) "was intended to mark not just the beginning of the reasonable time period, but also the point at which Article 6 starts to apply".[28] Other authors in the field simply state that "from this definition it follows that article 6 also applies to the pre-trial phase, but only from the moment a charge has been brought".[29]

In relation to the point in time in which Article 6(1) begins to run, interestingly the Court recognised the possibility of a violation of Article 6(1) (with reference to the right against self-incrimination) when the prosecutor used material in the trial that was obtained by compulsion in a phase of the proceedings where the guarantees

26 *Eckle v. Germany*, ECHR, no. 8130/78, 15 July 1981, para. 73. The Court has considered that a situation that occurs before the formal lodge of a charge against an individual can constitute a charge, such as the appointment by a person of a lawyer after the opening of a file by the prosecutor following a police report against the person concerned (*Angelucci v. Italy*, ECHR, no. 12666/87, 29 February 1991).

27 *Lutz v. Germany*, ECHR, no. 9912/82, 25 August 1987, para. 52.

28 Trechsel, above n. 13 at p. 138.

29 Van Dijk P., Van Hoof F., Van Rijn A. and Zwaak L., *Theory and Practice of the European Convention on Human Rights*, Intersentia, 4th Edition 2006, p.541.

of Article 6 did not operate.[30] In the case of *Saunders v. The United Kingdom*, the applicant had been the subject of an investigation, carried out by the Department of Trade and Industry (DTI) in relation to alleged fraud. The Companies Act 1985 regulated this investigation, which did not have the characteristics of a criminal investigation. This procedure did not allow the suspect to remain silent and forced him to answer all the DTI inspectors' questions, on pain of a fine or imprisonment. In several interviews, Mr. Saunders made statements that were later used by the prosecutor to prove his case at trial. There was no controversy over the non-applicability of article 6 to the DTI investigation and the Court was asked whether the subsequent use of those statements by the prosecution amounted to a violation of Article 6(1).[31] The ECtHR answered in the affirmative, holding that the fact that the relevant statements had been made by the applicant prior to him being charged did not prevent their use at trial from constituting a violation of Article 6(1). It is therefore possible that measures taken before the existence of a charge, in the autonomous meaning of the Court, will also have negative repercussions in relation to the respect for Article 6(1) at a later stage. What was found to have violated Article 6(1) in the above-described case was not the procedure compelling the applicant to answer the inspector's questions, as that phase was not covered by Article 6(1), but the subsequent use of the statements obtained in that manner as evidence against him during trial.[32] Furthermore, the Court stressed that it was irrelevant whether the statements made by the applicant were of an incriminating nature or not and concluded that "the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant".[33] This alone was sufficient to find a violation of Article 6(1).

Interestingly in the case of *Zaichenko v. Russia*, the ECtHR went even further in relation to the moment in which an individual can be considered "substantially affected" and therefore charged in accordance with the provision of Article 6 of the Convention. In this case, the applicant worked as a driver for a private company.[34] The director of the company asked the authorities to carry out checks on its employees following reports of diesel being removed from service vehicles. The applicant was stopped at one of these road checks and two jerry cans of diesel were found following an inspection of his car. He was not informed of the reasons for the check nor of his right to remain silent. Questioned by the police, in the course of the road check, Mr. Zaichenko stated that he had removed the diesel from the vehicle he used at work. The police officers drafted a record of the inspection. Only after these events was he informed of his right to remain silent and criminal proceedings were instituted against him. At the trial, the applicant contended that he had purchased the fuel at a petrol station and produced an invoice of the purchase. He claimed that he did not tell about the purchase to the police as he felt intimidated and had no receipt with him. The judges relied on the inspection

30 *Saunders v. The United Kingdom*, ECHR, [GC], no. 19187/91, 17 December 1996.
31 Ibid. at para. 74.
32 Ibid. at para. 71.
33 Ibid. at para. 72.
34 *Zaichenko v. Russia*, ECHR, no. 39660/02, 18 February 2010.

records in which Mr. Zaichenko had admitted stealing the fuel and sentenced him for theft.

The ECtHR noted that the admissions made by the applicant during the road check led to the imposition of criminal proceedings and were later used for his conviction at trial. Consequently, although at the date on which the applicant was stopped he was not accused of any criminal offence, "the proceedings on that date substantially affected his situation" and therefore article 6 of the Convention was applicable to the case.[35] In reaching its finding, the Court seems to have given weight to the existence of the suspicion of theft against the applicant that already existed at the time the road check was carried out because of the context of the road check and the the applicant's inability to produce any proof of the diesel's purchase.[36] Consequently, the Court found that the police should have informed Mr. Zaichenko of the privilege against self-incrimination and the right to remain silent from the beginning of the questioning despite the fact that there were not yet criminal proceedings imposed against him.

The Court acknowledged the possibility that events, which occurred before the imposition of criminal proceedings, can also substantially affect the situation of the applicant triggering the applicability of Article 6 of the Convention. Therefore, according to the evolving case law of the Court it seems arguable that a charge, within the autonomous meaning of the Convention, may even come into being before the opening of criminal proceedings. The ECtHR however, stated that although it accepted the applicability of Article 6(1) and 3(c) to pre-trial proceedings, the manner in which such application takes place "depends on the special features of those proceedings and the circumstances of the case assessed in relation to the entirety of the domestic proceedings conducted in the case".[37]

The above-discussed right against self-incrimination is closely linked to the presumption of innocence of any individual charged with a criminal offence which is regulated in Article 6 paragraph 2 of the Convention.[38] The ECtHR stated that the presumption of innocence is a constituent element of the general right to a fair trial[39] and as such "is intended to enshrine the fundamental principle of the rule of law".[40]

The right to be presumed innocent requires, *inter alia*, that "when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused".[41] The environment in which the trial takes place must be one that is open to any outcome according to the evidence adduced. This attitude must inspire the conscience and behaviour

35 Ibid. at para. 43.
36 Ibid. at paras. 42 and 52.
37 Ibid. at para. 45.
38 *Saunders v. The United Kingdom*, ECHR, [GC], no. 19187/91, 17 December 1996, para. 68.
39 See *ex multis Kyprianou v. Cyprus*, ECHR, no. 73797/01, 27 January 2004, para. 52.
40 *Salabiaku v. France*, ECHR, no. 10519/83, 7 October 1988, para. 28.
41 *Barbera, Messegue and Jabarado v. Spain*, ECHR, no. 10588/83, 6 December 1988, para. 77.

of the members of the court before which the trial unfolds preventing them from expressing any opinion or comment unveiling their lean towards the accused's guilt. The Court explained this stating that "the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty".[42]

The presumption of innocence also has implications in relation to the role of the prosecutor and other government officials. The Court stated clearly that "the principle of the presumption of innocence may be infringed not only by a judge or court but also by other public authorities including prosecutors".[43] Although the prosecutor leads the case against the accused he should remember that the defendant has not yet been convicted and until that moment there should still be room for his acquittal despite his opinion, which in any case should not be made public. In *Daktaras v. Lithuania*, the defendant had applied for the dismissal of the charges and the discontinuation of the proceedings. The prosecutor performed a quasi-judicial function as he was in charge of ruling on the application. In his decision rejecting it he pointed to the guilt of the applicant. The ECtHR highlighted the distinction between statements made by the prosecution in the context of the proceedings ("in the course of a reasoned decision at a preliminary stage") and public statements that are made by the authorities outside the framework of the criminal proceedings, such as in a press conference. It concluded that only the latter constitute a violation of Article 6(2).[44]

3. Article 6(3) of the European Convention of Human Rights

3.1 Introduction

The guarantees listed in paragraph 3 of Article 6 of the Convention constitute a minimum number of rights that the defence enjoys in a criminal trial. As noted before, the list is not exhaustive and these rights are components of the more encompassing right to a fair trial described in paragraph 1 of Article 6. As we also saw, even when each of the rights listed in paragraph 3 are respected in criminal proceedings, its overall fairness is open to questioning and a violation of the right to a fair trial might be take place nonetheless. On the other hand, the lack of respect for one of the above-mentioned guarantees alone may compromise the fairness of the proceedings. However, the violation of one of the guarantees of Article 3 does not automatically lead to a violation of the right to a fair trial.[45]

There is an overlap between the guarantees of paragraph 3 and the principles of paragraph 1 of Article 6, which, as mentioned, usually leads the Court to analyse a

42 *Minelli v. Switzerland*, ECHR, no. 8660/79, 15 March 1983, para. 37.
43 *Daktaras v. Lithuania*, ECHR, no. 42095/98, 10 October 2000, para. 42.
44 Ibid. at para. 44.
45 See *Asch v. Austria*, ECHR, no. 12398/86, 26 April 1991; *Doorson v. The Netherlands*,ECHR, no. 20524/92, 26 March 1996.

case against the background of a specific violation claimed by the applicant under paragraph 3 in conjunction with the general paragraph 1 of article 6. Authors in the field have criticised this approach based on a blurred application of paragraphs 1 and 3 of article 6 and on the Court's reluctance to define clearly and autonomously the meaning of the defence's rights in paragraph 3.[46]

An example of this tendency can be found in *Hadjianastassiou v. Greece*. The Court explained that "as the requirements of paragraph 3 of Article 6 (art. 6-3) constitute specific aspects of the right to a fair trial, guaranteed under paragraph 1 (art. 6-1), the Court will examine the complaint under both provisions taken together".[47] As Trechsel noted with criticism, in this case the Court did not even clarify which of the Article 6(3) guarantees it intended to take into account in its analysis.[48]

In the context of this book, the analysis will be extended to subparagraphs (a), (b), (c) and (d) of Article 6(3) which bear more implications than subparagraph (e) in relation to the disclosure of information in criminal trials, as will be discussed below.

3.2 Article 6(3)(a)

Article 6 (3) (a) states that every person charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". The wording of this provision resembles the content of Article 5(2) of the Convention, which applies only to persons arrested.[49] However, the application of Article 6(3)(a) is broader to the extent that it may apply also to individuals who are under investigation but are not subjected to a detention measure.

The purpose of Article 6(3)(a) is to guarantee that the accused knows, promptly and in detail, of the accusations against him as this is the only possible way he can defend himself effectively. Here lies the main difference with the provision of Article 5(2), which instead aims to afford the detained person the necessary information to effectively challenge his detention.[50]

There is a close connection between subparagraphs (a) and (b) of Article 6, the latter of which regulates an individual's right to have adequate time and facilities for the preparation of his defence. This connection was affirmed by the ECtHR which stated "that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in light of the accused's right to prepare his defence".[51] This statement shows the approach followed by the Court, which is clearly a functional one. The right to be informed of the accusations must be read in its connection to the right

46 See Trechsel, above n. 13 at pp. 87 - 88.
47 *Hadjianastassiou v. Greece,* ECHR, no. 12945/87, 16 December 1992, para. 31.
48 See Trechsel, above n. 13 at pp. 87 - 88.
49 Article 5(2) of the Convention states that "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him".
50 See Harris, O'Boyle & Warbrick, above n. 1 at p. 468.
51 *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999, para 54.

to have adequate time and facilities to prepare the defence and not as an absolute right that stands alone. Consequently, there can be no violation of Article 6(3)(a) unless it is proved that the accused's preparations for defence were affected by the lack, inaccuracy or vagueness of the communication of the nature and cause of the accusation against him.

The ECtHR's jurisprudence seems to elaborate on whether the information received affected the defence was insufficient as claimed. In *Sadak v. Turkey*, the Court stated that it was not its duty "to assess the merits of the defences the applicants could have relied on if they had had enough time to prepare their defence against the accusation of belonging to an illegal armed organization. It merely notes that it would be reasonable to argue that the defences would have been different from those used".[52]

The speculative assessment that the Court is called on to perform in order to determine whether the shortcomings in the information received pursuant Article 6(3)(a) damaged the preparation of the defence has been criticised by authors such as Trechsel who are in favour of an absolutist approach. The latter considers Article 6(3)(a) as an independent right of the accused whose violation should not be linked to the establishment of specific difficulties experienced by the defence.[53] The Court has often given a reading of this provision in connection not only with Article 6(3)(b) but also with the general right to a fair trial adopting an "integrated approach".[54] It considers "that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair".[55]

The nature and the cause of the accusation are the subject of the right to be informed as regulated by Article 6(3)(a). The cause of the accusation concerns the acts the accused is alleged to have committed and on which the accusation is based, whereas the nature pertains to the legal qualification given to these material facts. The Strasbourg Court examined several applications regarding instances in which, during the proceedings, the legal qualification of the accusation had been changed.[56] It affirmed that "the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them [the changes] and organize his defence on the basis of any new information or allegation".[57]

As we have seen before, in *Péllissier and Sassi v. France* the accused was charged with bankruptcy but sentenced for aiding and abetting bankruptcy. The applicants did not contest the right of the court to return an alternative verdict but claimed

52 *Sadak v. Turkey*, ECHR, [GC], no. 10226/03, 17 July 200111, para. 55. In *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, the Court noted that "the defence was confronted with exceptional difficulties", para. 71.
53 See Trechsel, above n. 13 at pp. 193-195.
54 Trechsel, above n. 13 at p. 201.
55 *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999, para. 52.
56 See *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999, *Chichlian and Ekindjian v. France*, ECHR, no. 10959/84, 29 November 1989, *Sadak v. Turkey*, ECHR, [GC], no. 10226/03, 17 July 2001, *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, *Dallos v. Hungary*, ECHR, no. 29082/95, 1 March 2001.
57 *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, para. 61.

that, since aiding and abetting changed the legal characterisation of the offence, the information they had been given in relation to the charge was not detailed. They did not have the opportunity to file arguments on the different characterisation of the offence before the sentence as they were not informed of it and therefore they could not set up an effective defence. The Court found a violation of Article 6(3)(a) in combination with paragraph 1 of the same article because the accused "were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the re-characterisation of the facts. Plainly, that was too late".[58]

The information must be given "in detail" although the level of specificity might be different according to the different stages of the proceedings. However, it must always be sufficient for the accused to be able to "understand fully the extent of the charges against him with a view to preparing an adequate defence".[59] Furthermore, the adequacy of the information must be assessed against both the background of subparagraph (b) as well as against the general right to a fair trial. The information must clearly state the facts underlying the charge and the circumstances, place, time and any accomplices of the accused. It does not have to mention the evidence corroborating the charge. Non-specific information can affect the preparation of the defence and impair the accused's right to a fair trial.

In *Mattoccia v. Italy*, the applicant submitted that the notification of the accusation against him had been vague and imprecise and had adversely affected his right of defence to the extent that he was not in the position to choose the best strategy for the defence. The ECtHR found that "the information contained in the accusation was characterised by vagueness as to essential details concerning time and place, was repeatedly contradicted and amended in the course of the trial" and therefore the defendant should have been "afforded greater opportunity and facilities to defend himself in a practical and effective manner".[60]

Although the wording of subparagraph (a) suggests the existence of an obligation upon the authorities to inform the accused, the Court seems to take a different approach, focusing on the accused's right to be informed by any source and means rather than the proactive duty of governments.[61] Consequently, the ECtHR's scrutiny has not focused on the fulfilment by the authorities of their duty to inform but on whether the accused was, or could have been with due diligence, in possession of the necessary information for his defence. The difference is subtle but exists nonetheless and cannot be underestimated. The duty to inform implies an active obligation upon the authorities, which cannot be limited to putting the accused in the position where he can infer the relevant information from the surrounding circumstances.

In more recent decisions, the Court has reinforced the view that authorities have an obligation to communicate the information to the accused. In *Mattoccia*, the

58 *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999, para. 62.
59 *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, para. 60.
60 Ibid. at para. 71.
61 See Trechsel, above n. 13 at p. 203.

Court reiterated that "even though the applicant could have sought access to the prosecution file in due time, that did not release the prosecution from its obligation to inform the accused promptly and in detail of the full accusation against him. That duty rests entirely on the prosecuting authority's shoulders and cannot be complied with passively by making information available without bringing it to the attention of the defence".[62]

Article 6(3)(a) also requires the information to be given "promptly" (*dans le plus court délai*) to the accused. Lacking clear jurisprudence about the definition of promptly, differences of opinion arise among legal scholars. For instance, Stavros supports the Human Rights Committee's interpretation, which considers that "this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such". This approach is based on the importance of the investigative stage and on the need for the defence to be involved, which must occur as soon as possible. On the other hand Trechsel, although in favour of the rationale behind the previous interpretation, believes that only the indictment is the instrument that triggers the obligation of notification of the information ex Article 6(3)(a).[63] Interestingly, Trechsel submits that since the information must be given in detail this is possible only at the closing of the investigation when sufficient material has been gathered in order to draft the indictment. However, he concedes that this consideration does not necessarily lead to the conclusion that the defence enjoys no right of information before the notification of the indictment. This right pertains to the case file though and not to the charge and belongs to the realm of the facilities envisaged in Article 6(3)(b).

As far as the method of communication of the relevant information is concerned, no specific requirements are mentioned in the Convention. In *Kamasinski v. Austria*, the applicant was a US citizen arrested upon his arrival in Austria on suspicion of fraud and misappropriation. Mr. Kamasinski did not speak German and claimed that since the indictment was served upon him in German his in his right to defend himself was prejudiced. The ECtHR noted that from the circumstances of the case it emerged that the applicant had been given a full oral explanation, in English, of the charges against him. That was considered sufficient for the purposes of Article 6(3)(a), which does not require written communication.[64] The absence of a written translation of the indictment did not influence the Court's findings. This is in line with the Human Rights Committee's interpretation that provided the information of subparagraph 3 (a) indicates both the law and the alleged facts it can be conveyed either orally or in writing.[65]

62 *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, para. 65.

63 As an example of the first interpretation see Stavros S., *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*, Martinus Nijhoff Publishers 1993, pp. 63-64. For the second interpretation see Trechsel, above n. 13 at pp. 198-200.

64 *Kamasinski v. Austria*, ECHR, no. 9783/82, 19 December 1989.

65 Human Rights Committee, General Comment on Article 14, para. 8. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6b722416a295f264c12563ed0049dfbd?Opendocument

3.3 Article 6(3)(b)

Subparagraph (b) of Article 6(3) grants every person charged with a criminal offence the right to have adequate time and facilities to prepare his defence. In *Can v. Austria*, the leading case on this issue, the Commission explained the meaning of this provision affirming that it requires that the accused must have "the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings".[66] The Commission stated that Article 6(3)(b) implies that the substantive preparation for the defence (on behalf of the accused) may include everything that is necessary to prepare for the trial.

Interestingly, there is a difference between the English and the French text of the Convention. The former employs the term "adequate" to characterise the time and the facilities that the defence must have at its disposal, whereas the French text uses the term necessary (*disposer du temps et des facilités nécessaires à la préparation de sa defence*). The different terminology shows that the English "adequate" is broader than the French *nécessaires* insofar as it suggests that the time and facilities must be adequate to the needs and characteristics of the specific case and can go beyond those which are strictly necessary to the preparation of the defence. The Commission acknowledged the existence of different terminology but stated that despite such a "slight difference in meaning…it is clear that the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence".[67]

This "slight difference" also has bearings in relation to the issue of the prejudice the defence must demonstrate had been suffered in order to claim violation of the provision of Article 6(3)(b). A narrower approach (French) means that the defence has to show the impossibility of mounting his defence without the time and facilities sought whereas by adopting the broader approach (English) for the defence it would be sufficient to show that there would have been better opportunities for the defence had it had at its disposal the time and facilities requested.[68]

As far as the time given to a person to prepare his defence (for the first instance trial) is concerned, its adequacy can only be assessed once he has been informed of the accusations against him. This provision is clearly intertwined with subparagraph (a) of Article 6(3). Trechsel notes that it is a "sheer matter of logic" that each time there is a violation of Article 6 (3) (a), paragraph 3 (b) has also been infringed.[69] We have discussed above that also the opposite situation may be applicable.

Authors in this field such as Harris, O'Boyle and Warbrick contend that the guarantee to have adequate time begins to operate from the establishment of a criminal charge. As we have discussed this also means from the moment an

66 *Can v. Austria*, European Commission of Human Rights, no. 9300/81, 12 July 1984, para. 53.
67 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, para. 57.
68 See Trechsel, above n. 13 at pp. 211-212.
69 Ibid. at p. 218.

individual is targeted by a measure which "likewise substantially affect" his situation.[70] Trechsel, on the other hand, commenting on this position, shares the opinion that the application of the adequate time guarantee is not restricted to the trial or appeal stage but underlines that the charge does not mark the beginning of the relevant period in the same manner as it does in relation to Article 6(1) and the reasonable time.[71] The term "adequate" is a relative term, which has a different meaning according to the different phase of the criminal proceedings in relation to which its adequacy must be assessed.

The Court mentions several relevant factors to be taken into account in the assessment of the adequacy of the time such as the complexity of the case, the accused representing himself, the workload of the appointed lawyer and the stage of the proceedings. An assessment of the adequacy of time will necessarily take place on a case-by-case basis. There is no general rule applicable to each case. However, the tendency in the ECtHR's jurisprudence is to be reluctant to find violations in the absence of proof that actual prejudice has been suffered by the accused as a result of inadequate time.

In relation to the "adequate facilities", the Commission defined them as including (for the accused) "the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings".[72] Disclosure is the most relevant among the "adequate facilities" the accused has the right to enjoy in the preparation of his defence. It seems inevitable that in order to have the best opportunity to mount an effective defence the accused must not only be informed of the accusation against him [Article 6(3)(a)] but also have knowledge of the material that forms the basis of the prosecution's case. This issue will be the object of the analysis carried out in the next chapter.

Although the most relevant, disclosure is not the only facility the accused has the right to enjoy to prepare his defence. The access to legal assistance is another fundamental facility a person charged with a criminal offence has the right to have at his disposal under Article 6(3)(b). There is a significant overlap with the guarantee provided for by Article 6(3)(c) under whose umbrella this will be tackled in this chapter.

A preliminary condition for the right to adequate time and facilities is that, before claiming its violation, the defence must have tried all available means of being granted an extension of time and facilities. In other words, a certain degree of action is expected of the defence before it can claim a violation of its Convention rights. The principle confirms the subsidiary nature of the Convention and its organs.[73] However, in *Galstyan v. Armenia*, where the applicant had been sentenced through an expedited procedure, completed within one day, the ECtHR

70 See Harris, O'Boyle & Warbrick, above n. 1 at pp. 470-471. See *Foti and Others v. Italy*, ECHR, no. 7604/76, 10 December 1982, para. 52.
71 See Trechsel, above n. 13 at p. 219.
72 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, para. 56.
73 See Trechsel, above n. 13 at p. 214.

found that the fact that the applicant had not filed any application requesting an extension of time, during the extremely short pre-trial stage (consisting of a few hours) could not be held against him. In fact, it did not "necessarily imply that no further time was needed for him to be able – in adequate conditions – to properly assess the charge against him and to consider various avenues to defend himself effectively".[74] In the same case, the ECtHR tackled the government's position in relation to the accused's possibility to have his case adjourned. Specifically, the Court found that "the Government have failed to demonstrate convincingly that the applicant unequivocally enjoyed, both in law and in practice, the right to have the examination of his case adjourned in order to prepare his defence and that such an adjournment would have possibly been granted, had the applicant made a relevant request".[75] This decision seems to switch the burden of proof from the defendant to the government insofar as it requests the authority to clearly show that the accused enjoyed the adequate time and facilities (in this case the possibility to have his case adjourned).

We have discussed that the Court performs a speculative analysis to assess whether the defence was impaired in the circumstances of the specific case. In *Öcalan v. Turkey*, the ECtHR concluded that it was "reasonable to assume that, had he been permitted to study the prosecution evidence directly for a sufficient period, the applicant would have been able to identify arguments relevant to his defence other than those his lawyers advanced without the benefit of his instructions".[76] In *Galstyan v. Armenia*, the court concluded that it doubted that "the circumstances in which the applicant's trial was conducted were such as to enable him to familiarize himself properly with and to assess adequately the charge and evidence against him, and to develop a viable legal strategy for his defence".[77]

3.4 Article 6(3)(c)

Subparagraph (c) of Article 6(3) regulates the right of a person charged with a criminal offence to defend himself in person, to have legal assistance of his own choosing or to be provided with legal aid should he not be able to afford an attorney. The main purpose of this provision is to guarantee that in any criminal proceedings the accused person will have adequate representation for his case.[78]

The ECtHR noted the overlap of this provision with the adequate facilities of Article 6(3)(b) mentioned above. In *Campbell and Fell v. the United Kingdom*, the ECtHR considered the access to a lawyer as one of the facilities referred to in subparagraph (b) and concluded that where the applicant was denied access to a lawyer "the "facilities" contemplated by sub-paragraph (b) (art. 6-3-b) were not afforded".[79] Although the two provisions are clearly connected, the application of Article 6(3)(c) is broader than article 6(3)(b) as it is not linked to the preparation of the trial

74 *Galstyan v. Armenia,* ECHR, no. 26986/03, 15 November 2007, para. 86.
75 Ibid. at para. 85.
76 Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 143.
77 *Galstyan v. Armenia,* ECHR, no. 26986/03, 15 November 2007, para. 87.
78 See *Pakelli v. FRG*, European Commission of Human Rights, no. 8398/78, 12 December 1981, para. 84.
79 *Campbell and Fell v. The United Kingdom*, ECHR, no. 7819/77, 28 June 1984, para. 99.

but confers to the accused a more general right to be legally assisted during the entire proceedings.[80]

The right to legal assistance is not dependent on the proof of actual prejudice. In *Artico v. Italy*, the Italian government argued that in order to claim a violation of Article 6(3)(c) the applicant had to show that the lack of representation had caused actual prejudice.[81] The ECtHR did not share this argument and stated that by opting for such a high threshold of proof the government was asking the impossible.[82]

Several important principles regarding the interpretation of Article 6(3)(c) were reiterated by the ECtHR in two cases concerning Turkey. First of all, the Court stated that the right to a defence is not limited to the trial stage. In Öcalan v. Turkey, the applicant had been interrogated for seven days upon his forced return to Turkey and his lawyers had been prevented from any contact with him.[83] In this period, he had made self-incriminating statements. The ECtHR held that "to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence".[84]

The case of *Salduz v. Turkey* is relevant in relation to the right to legal assistance in the pre-trial stage. The Court in fact, underscored the importance of the investigation stage, because the evidence gathered will influence the trial and because the accused is particularly vulnerable.[85] The presence of a lawyer can be the best way to compensate for such vulnerability. The ECtHR concluded that "access to a lawyer should be provided from the first interrogation of a suspect by the police".[86] In this regard, Judge *Bratza,* in his concurring opinion appended to the judgment, regretted that the Court did not go so far as to state that a suspect should be granted access to a lawyer from the moment of the beginning of police custody or pre-trial detention.[87] However, other judges were of the opinion that the legal principle to be derived from the judgment is that an accused person is indeed entitled to legal assistance from the onset of pre-trial detention or police custody in order "to be visited by defence counsel to discuss everything concerning his defence and his legitimate needs".[88]

Restrictions on the accused's access to a lawyer in the pre-trial stage can be justified with good reason, provided that they do not affect the fairness of the proceedings as a whole. Compelling reasons attached to the nature of each case must be proven in order to justify any restriction. However, such restriction must not irretrievably prejudice the rights of the defence. This scenario would materialise when a suspect, whose right to legal assistance has been restricted, makes self-incriminating

80 See *Can v. Austria*, European Commission of Human Rights, no. 9300/81, 12 July 1984, para. 54.
81 *Artico v. Italy*, ECHR, no. 6694/74, 13 May 1980, para. 35.
82 Ibid. at para. 35.
83 Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005.
84 Ibid. at para. 131.
85 *Salduz v. Turkey*, ECHR, [GC], no. 36391/02, 27 November 2008, para. 54.
86 Ibid. at para. 55.
87 Ibid., Concurring opinion of Judge Bratza.
88 Ibid., Concurring opinion of Judges Zagrebelsky, Casadevall and Türmen.

statements later used for his conviction.[89]

Furthermore, in Öcalan v. Turkey the Strasbourg Court underlined that Article 6(3)(c) entails, as a basic requirement, the accused's right to communicate with his lawyer in private, out of the hearing of third parties.[90] "If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective".[91] The Court stressed that the mere assignment of a lawyer to an accused it is not *per se* sufficient to ensure the effectiveness of the assistance he may afford to his client.[92]

In relation to the length and frequency of the communication between the accused and his lawyers, the Court held as unacceptable that the interviews Mr. Öcalan had with his legal representative had been limited to two one-hour meetings per week. In so doing the Court disregarded the government's justification that the restriction was due to logistic problems (the accused was imprisoned on an island). It found that "the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport, thereby increasing the length of each individual visit, when such measures were called for as part of the 'diligence' the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner".[93]

3.5 Article 6(3)(d)

Subparagraph (d) of Article 6(3) grants the accused the right to examine or have examined the witnesses testifying against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision forms part of the broader right to a fair trial and reflects the required adversarial nature of the trial and the principle of the equality of arms, which must guide the regulation of the trial. The right to challenge the other side's evidence and to present their own evidence is a fundamental right of the defence. It is the concrete expression of the active role entrusted to the defendant in facing the accusation against him by presenting evidence able to corroborate his account of the events in order to influence the court.

The ECtHR clarified in *Kostovski v. Netherlands* that according to the autonomous meaning adopted by the Convention, a witness is any person whose statement has been put before the court and taken into account by it.[94] Therefore, the term witness is not limited to individuals who give oral evidence in a courtroom but it is

89 See *Salduz v. Turkey*, ECHR, [GC], no. 36391/02, 27 November 2008, para. 55 and Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005.
90 Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 133.
91 Ibid. at para. 133.
92 Ibid. at para. 135, *Salduz v. Turkey*, ECHR, [GC], no. 36391/02, 27 November 2008, para. 51, *Imbrioscia v. Switzerland*, ECHR, no. 13972/88, 24 November 1993, para. 38.
93 Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 135.
94 *Kostovski v. The Netherlands*, ECHR, no. 11454/85, 20 November 1989, para. 40.

extended to individuals who have given statements before the trial as long as these statements are presented at trial.[95]

Article 6(3)(d) embodies two rights enjoyed by the defendant; the right to cross-examine the prosecution's witnesses and the right to obtain the attendance and examination of his own witnesses. In relation to the right to cross-examine the prosecution's witnesses, Article 6(3)(d) is generally violated when statements are admitted as evidence in the absence of the cross-examination of their authors during the trial. "All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument".[96] Exceptions apply to this rule "but they must not infringe the rights of the defence". There are competing interests that cannot be ignored and need to be weighed, assessing the defence's right to cross-examine a witness who has given a statement that the prosecution is seeking to have admitted as evidence. The need to protect an undercover police agent, a victim of sexual violence or a witness exposed to reprisals are only a few examples of these competing interests.

The task of the Court under the Convention "is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair".[97] This approach regarding the admission of evidence is in line with the "fourth instance doctrine" adopted by the Court.

On this issue, the ECtHR has stated that "to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6" if the defence's rights have been respected.[98] The latter condition requires "that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings".[99]

In *Doorson v. the Netherlands*, the applicant was convicted of drug trafficking on the basis of statements by anonymous witnesses and a witness who attended trial but then absconded. The anonymous witnesses were ultimately questioned at the appeal stage, in the presence of the applicant's lawyer, but not the applicant, and without the identity of the witnesses being revealed to the applicant's lawyer. The Court found no violation. It was satisfied that it was "established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities".[100] However, the Court also recalled that regardless of the effectiveness of the measures available to the defendant to counterbalance the curtailing of his right to cross-examine the prosecution's witnesses, "a conviction should not be based either solely or to a decisive extent

95 Interestingly, also an expert witness appointed by the court can become a witness against the accused when his evidence goes against the defence put forward by the defendant.
96 *Van Mechelen and Others v. The Netherlands*, ECHR, no. 21363/93, 23 April 1997, para. 51.
97 Ibid. at para. 50.
98 *Kostovski v. The Netherlands*, ECHR, no. 11454/85, 20 November 1989, para. 41.
99 Ibid.
100 *Doorson v. The Netherlands,* ECHR, no. 20524/92, 26 March 1996, para. 72.

upon anonymous statements".[101] This is the so-called "sole or decisive rule".[102] A defining difference therefore, is constituted by the presence of other corroborating evidence against the accused of the same probative value as the anonymous witness statement.

In *Lucà v. Italy* the Court made clear that "if the defendant has been given an adequate and proper opportunity to challenge the depositions either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6".[103]

More recently the ECtHR, in *Al-Khawaja and Tahery v. the United Kingdom*, stated that "where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case".[104] Where the final decision was not based solely or to a decisive extent on the untested evidence the ECtHR applies a balancing test to assess whether the rights of the defence have been respected. The Court assesses the measures undertaken by the authorities to regulate the interrogations of the anonymous witnesses in order to ascertain whether the handicaps under which the defence is compelled to work [due to the anonymity of one or more witnesses] are sufficiently counterbalanced by the procedure followed by the judicial authorities.[105] In *Kok v. The Netherlands,* in which the untested evidence was relevant but not decisive, the Strasbourg Court considered that because the investigating judge had tested the reliability of the anonymous witness giving a reasoned opinion and that the defence had had the opportunity to question the investigating judge in open court the restrictions on the rights of the defence had been sufficiently counterbalanced.[106]

The ECtHR has particular concern over statements given by police officers who remained anonymous when acting as witnesses at trial. In *Van Mechelen v. The Netherlands* the Court stated that the position of anonymous witnesses who are police officers is different from the one of other disinterested anonymous witnesses due to the link between the police and the state and in turn between the police

101 Ibid. at para. 76.
102 See also *Unterpertinger v. Austria*, ECHR, no. 9120/80, 24 November 1986, para. 33.
103 *Lucà v. Italy*, ECHR, no. 33354/96, 27 February 2001, para. 40.
104 *Al-Khawaja and Tahery v. The United Kingdom*, ECHR, [GC], no. 26766/05, 15 December 2011, para. 147. See also *Donohoe v. Ireland*, ECHR, no. 19165/08, 12 December 2013.
105 See *Kok v. The Netherlands*, ECHR, no. 43149/98, 4 July 2000.
106 Ibid.

and the prosecution representing the state at trial. In this case, the police officers in question had been interrogated in a separate room by the investigating judge without the defendant and his lawyer being present. They could assist through a sound link system, which did not allow them to pose direct questions to the agents and observe their demeanor in order to test their reliability. The Court noticed that the only evidence relied upon in the judgment to identify the applicants as the perpetrators were the statements given by the anonymous police officers. Under these circumstances, it concluded that the trial had not been fair.[107]

The second part of the provision of Article 6(3)(b) regulates the accused's right to obtain the attendance and have the witnesses examined on his behalf. The close connection between this guarantee and the principle of equality of arms is explicit in the wording of the provision, which states that the attendance and examination of witnesses on behalf of the defendant must take place "under the same conditions as witnesses against him".

Also in relation to the right to examine defence witnesses, the ECtHR felt the need to reaffirm that it is for the domestic courts to assess the relevance of the evidence in the framework of criminal proceedings. However, "there are exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6".[108] The ECtHR reiterated in its case-law that "it is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair".[109]

In *Engel v. Netherlands*, the Court made clear that Article 6(3)(d) does not grant the accused the right to obtain the attendance and the examination of every witness. The Convention "leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6".[110] In this judgment, the Court stated that the essential aim of the provision was the equality of arms over matters of evidence.

This statement was revisited in the case of *Vidal v. Belgium*, where exceptionally the ECtHR found a violation of Article 6(3)(d) in relation to the non-admission of defence witnesses. In this case, the *Cour de Cassation* had remitted the case of the applicant to the Court of Appeal, which denied his request to examine four witnesses without any explanation for the decision. The Court of Appeal increased the sentence from three to four years and did not suspend the sentence. The ECtHR noted that, although the principle of equality of arms had been respected, as also

107 *Van Mechelen and Others v. The Netherlands*, ECHR, no. 21363/93, 23 April 1997, paras. 56-63.
108 *Bricmont, v. Belgium*, ECHR, no. 10857/84, 7 July 1989, para. 89.
109 *Ex multis, Khan v. United Kingdom*, ECHR, no. 35394/97, 12 May 2000, para. 34.
110 *Engel and Others v. The Netherlands*, ECHR, no. 5100/71, 8 June 1976, para. 91.

the prosecutor had not been admitted any witness, such principle did not exhaust the meaning of Article 6(3)(d). It went on to state that the "complete silence" of the judgment on the denial of admission of evidence was not consistent with the right to a fair trial, which had therefore been violated.[111]

4. The principle of the equality of arms

The text of Article 6 of the Convention does not explicitly refer to the principle of the equality of arms. As mentioned above, the concept has been entirely developed by the case law of the Commission and the ECtHR. The standard definition of the principle of equality of arms states that each party must be granted a "reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[112]

The need for procedural equality between the parties in criminal proceedings was first affirmed by the Commission in several decisions given in the beginning of the 1960s.[113] These decisions, although dealing with different procedures, were similar to the extent that they examined domestic appeal proceedings where the defence had not been afforded the opportunity to be heard. On the other hand, the prosecutor had appeared before the Court making the submissions he considered fit and recommending an increase of the sentence.[114] As a result of the appeal proceedings at stake the impugned sentences had been raised. The Commission was asked "whether the notion of a 'fair trial' embodies any right relating to the defence beyond and above the minimum rights laid down in paragraph (3)".[115] In other words, the question was whether any rights of the defence could be derived from Article 6(1) other than the ones explicitly mentioned therein. The Commission answered the question in the affirmative when it explained the angle from which it intended to assess the case. In fact, it declined to review the cases under Article 6(3) as it found that they concerned the procedural equality between the defence and the prosecutor. The Commission found that the general and more inclusive provision of the right to a fair hearing also implied the notion of equality of arms. The latter is therefore an inherent element of Article 6 (1).

The principle of equality of arms does not concern the resources each party has. In criminal proceedings, it is accepted that the prosecutor will have resources in terms of personnel, funds and investigative techniques at his disposal, which would be impossible for the defendent to match. Nonetheless, the respect for the notion of the equality of arms guarantees that, despite these significant differences in resources, the defence and the prosecutor are granted the same opportunity to present their case and to challenge that of their opponent.

111 *Vidal v. Belgium*, ECHR, no. 12351/86, 22 April 1992.

112 *De Haes and Gijsels v. Belgium*, ECHR, no. 19983/92, 24 February 1997. See also *Ankerl v. Switzerland*, ECHR, no. 17748/91, 23 October 1996, para. 38; *Helle v. Finland*, ECHR, no. 20772/92, 19 December 1997, para. 53; *Krčmář and Others v. The Czech Republic*, ECHR, no. 35376/97, 3 March 2000, para 39.

113 See among others *Pataki v. Austria,* European Commission of Human Rights, no. 596/59, 28 March 1963 and *Ofner and Hopfinger v. Austria*, European Commission of Human Rights, no. 524/59, 23 November 1962.

114 Summers J.S., *Fair Trials, The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, Oregon and Portland 2007, pp. 103-104.

115 *Pataki v. Austria,* European Commission of Human Rights, no. 596/59, 28 March 1963, p. 49.

The idea underlining the principle is that of a fair balance between the parties. Therefore, the Court's perception of the role and functions of the defence and the prosecutor is essential. This perception can change in time leading to opposite interpretations regarding the same procedure. The ECtHR in *Delcourt v. Belgium* (1970) found that the procedure allowing the *Avocat Général* to make submissions during appeal proceedings and to be present during the deliberation of the judges was in line with the principle of equality of arms.[116] The Court's understanding of the *Avocat Général* was the crucial issue and the Court, in accordance with the Commission's findings, stated that he could not be considered as an opponent of the defendant as he was an objective figure whose task was to guarantee the respect of the law by the judges.

Twenty years later the same situation, in relation to the same procedure, led the ECtHR to depart from and overturn its previous findings. In *Borgers v. Belgium* (1991), the Court held that the principle of equality of arms and the right to a fair trial had "undergone a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice".[117] It concluded that "the opinion of the *procureur général*'s department cannot be regarded as neutral from the point of view of the parties to the proceedings before the Supreme Court. By recommending that an accused's appeal be allowed or dismissed, the official of the *procureur général*'s department becomes objectively speaking his ally or his opponent. In the latter event, Article 6 para. 1 (art. 6-1) requires that the rights of the defence and the principle of equality of arms be respected".[118] In reaching its verdict, the Court recalled that the Convention is a living instrument which must be interpreted in light of present day conditions. The decision was not unanimous and several dissenting opinions were appended to it. Some of the judges could not see any difference between this case and the *Delcourt* case that was able to justify such a radical departure from the latter.[119] Furthermore, it was argued that the ECtHR failed to give a clear and convincing justification for such a departure.[120]There is indeed no difference between the cases and the procedure examined. What has changed is the Court's perception of the role played by the official of the *procureur général*'s department.

The Court's decision in *Borgers* seems to illustrate a departure from the interpretation of unfairness (due to a violation of the principle of the equality of arms) as linked to the actual prejudice for the accused to an idea more attached to the appearance of fairness. In the latter, any affiliation with the prosecutor is sufficient to suggest partiality and therefore to harm the fairness of the trial, or at least the perception of its fairness, if the affiliated party communicates with the judiciary in the absence of the defence. The *procureur général,* although not formally associated with the prosecution, when recommending the granting or dismissal of the appeal would

116 *Delcourt v. Belgium*, ECHR, no. 2689/65, 17 January 1970.
117 *Borgers v. Belgium*, ECHR, no. 12005/86, 30 October 1991, para. 24.
118 Ibid. at para. 26.
119 Dissenting Opinion Judge Storme.
120 Dissenting Opinion Judge Martens.

take a position consequently being perceived as an associate or an opponent. In other words, the Court seems to have embraced, also in this respect, the principle that justice not only needs to be done but also needs to be seen to be done.

The principle of the equality of arms seems to find its ideal application in the contest between two parties before an impartial judge, which is clearly of an adversarial nature. It is more difficult to adjust it to an inquisitorial procedure where the prosecutor and the defence are characterised differently. Therefore, it is not surprising that the ECtHR decisions targeting longstanding procedures in civil law countries, which were found in violation of the principle of equality of arms, were harshly criticised.

5. The right to an adversarial trial

In *Barbera, Messegué and Jabarado v. Spain,* a case decided in the late 80's, the ECtHR stated that "the object and purpose of Article 6, and the wording of some of the sub-paragraphs in paragraph 3, show that a person charged with a criminal offence is entitled to take part in the hearing and to have his case heard in his presence by a tribunal. The Court infers that all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument".[121]

The right to an adversarial trial (*principe du contradictoire*) "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision".[122] State parties to the Convention are given freedom in ensuring the application of this principle as long as they guarantee that "the other party will be aware that observations have been filed and will get a real opportunity to comment thereon".[123]

What lies at the core of an adversarial trial is the right of the person concerned to be heard (*droit d'être entendu*) and to have his submissions to the court taken into account.[124] The Court gave the right to an adversarial trial the status of an absolute right. It applies to civil and criminal matters and it is not dependent on the nature of the material filed by the other party, be it concerned with the establishment of facts, the merits of the case or a procedural issue. The defendant should always be "given an opportunity to comment on evidence obtained in regard to disputed facts even if the facts relate to a point of procedure rather than the alleged offence as such".[125]

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121 *Barbera, Messegue and Jabarado v. Spain*, ECHR, no. 10588/83, 6 December 1988, para. 78.

122 *Vermeulen v. Belgium*, ECHR, [GC], no. 19075/91, 20 February 1996, para. 33, *McMichael v. The United Kingdom,* ECHR, no. 16424/90, 24 February 1995, para. 80; and *Kerojärvi v. Finland,* ECHR, no. 17506/90, 19 July 1995, para. 42. The French text reads as follow: *le droit à un procès pénal contradictoire implique, pour l'accusation comme pour la défense, la faculté de prendre connaissance des observations ou éléments de preuves produits par l'autre partie en vue d'influencer la décision judiciaire.*

123 *Brandstetter v. Austria*, ECHR, no. 11170/84, 28 August 1991, para. 67.

124 See Trechsel, above n. 13 at p. 89.

125 *Kamasinski v. Austria*, ECHR, no. 9783/82, 19 December 1989, para. 102.

Both the principle of the equality of arms and the right to an adversarial trial seem to lack a precise identity and definition and the Court has given the impression that it considers them intertwined if not interchangeable in their application in certain judgments. In *Lamy v. Belgium,* for instance, the Court found a violation of Article 5(4) insofar as "the procedure did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify a remand in custody" and concluded that "since it failed to ensure equality of arms, the procedure was not truly adversarial".[126]

However, a defining difference exists and allows the two concepts to be clearly discerned. The principle of the equality of arms is respected when there is a procedural balance between the parties whereas the right to an adversarial trial is an autonomous concept, which does not depend on the position of the other parties. It requires access to all the relevant material whether the opponent has access to it or not.[127] The ECtHR clarified the difference in a case in which the Constitutional Court of the Czech Republic had gathered *motu proprio* additional evidence that later constituted the basis for its judgment.[128] The evidence had not been communicated to either of the parties and therefore the principle of the equality of arms had been respected. There was, in fact, a balance between the parties, as they had both been excluded from the relevant material. However, because the applicant had not been able to comment on the "existence, contents and authenticity [of the additional evidence] in an appropriate form and within an appropriate time, if need be, in a written form and in advance"[129] there was an infringement of the right to an adversarial trial.[130]

An analysis of the case law concerning the right to an adversarial trial shows that the latter is linked to the right of the disclosure of information. The cases dealing with the *principe du contradictoire* mostly regard situations where the defence had not been given an opportunity to reply to a submission made by the prosecutor or cases where the prosecution had infringed its obligation to disclose evidence to the defence. These aspects will be tackled in the next section.

Concluding, the right to an adversarial trial as appears from the jurisprudence of the ECtHR embodies elements that are strictly linked to the disclosure of information such as the right to have knowledge of and challenge the other side's submission and the evidence adduced before the court. As far as these issues are concerned, a certain overlap occurs with the provision of Article 6(3), particularly with subparagraphs (a), (b) and (c). The right to an adversarial trial seems to create a friendly environment for the proliferation of the rights of the defence that are not limited to those listed in subparagraph 3 of Article 6.

126 *Lamy v. Belgium*, ECHR, no. 10444/83, 30 March 1989, para 29.
127 See Harris, O'Boyle & Warbrick, above n. 1 at p. 417.
128 *Krčmář and Others v. The Czech Republic*, ECHR, no. 35376/97, 3 March 2000, paras. 38-40.
129 Ibid. at para. 42.
130 For another example of this defining difference see *M.S. v. Finland*, ECHR, no. 46601/99, 22 March 2005.

6. Article 6 of the European Convention of Human Rights and the pre-trial stage

6.1 Introduction

The pre-trial stage of criminal proceedings is a delicate phase, the importance of which should not be underestimated when regulating the safeguards of the rights of the defence. The findings of the investigations are likely to influence the outcome of the trial phase. It is also a phase in which the suspect is in an extremely vulnerable position. He can be subjected to measures such as a search of his home, seizure of property, provisional detention, not to mention personal consequences of these measures such as discredited reputation and the stress of being suspected of the commission of a crime.

The Convention's lack of explicit regulation of the pre-trial stage leaves questions unanswered: what kind of guarantees does the person under investigation who is not detained enjoy? What kind of procedural guarantees are applicable to proceedings challenging the lawfulness of pre-trial detention? Does Article 6 have any bearing on the pre-trial stage? If so, do all its provisions apply or only some?

In order to answer these questions I will first analyse the relevant provisions of article 5 of the European Convention on Human Rights and the context in which they operate. The following scrutiny will focus on Article 5(2) and (4) which bear implications in relation to the disclosure of information to the suspect/accused. Furthermore, the analysis is limited to cases where the deprivation of liberty has occurred under Article 5(1)(c), namely in cases where a person has been arrested on suspicion of having committed an offence in order to be brought before the competent legal authorities or when it is necessary to do so to prevent him from committing an offence or to escape after having done so. Following this, I will return to Article 6.

6.2 Article 5 (2) and (4) of the European Convention of Human Rights

Article 5 of the Convention regulates certain specific guarantees for the persons who have been arrested and are detained in the course of the preliminary investigation. Article 5(2) reads as follows:

2. Everyone who is arrested should be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him...

The goal of Article 5(2) is to ensure that a person deprived of his liberty is informed of the reasons on which such measure is based to protect him against unfair detention. The arrestee must be informed of "the essential legal and factual grounds for his arrest"[131] in order to be able to face them and eventually to challenge the lawfulness of his detention according to the procedure envisaged in Article 5(4). However,

[131] *Fox, Campbell and Hartley v. The United Kingdom*, ECHR, no. 12244/86, 30 August 1990, para. 40.

this is not the only reason for this guarantee. The overlap between subparagraph (2) and (4) of article 5 is evident considering that the information given in the first provision is essential in order to trigger the second. The ECtHR acknowledged the inseparable connection between the provisions of Article 5(2) and 5(4) and in *Van der Leen v. The Netherlands* stated that "any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty".[132] Trechsel insists on the autonomous meaning of this provision that cannot be limited to be of use to the *habeas corpus* proceedings. The right to know about the reasons behind the arrest is a "legitimate purpose of the right under paragraph 2".[133]

The Convention does not mention a specific manner in which the information must be conveyed to the defendant, although the language employed must be "simple and non-technical and understandable by him".[134] The Court must assess on a case-by-case basis the adequacy of the promptness and the content of the relevant information.[135] As far as the promptness of the information is concerned, the ECtHR seemed to be at ease with a period of a few hours from the arrest.[136] However, there have been cases where even a significant delay of up to two days has been considered in compliance with the provision at stake.[137] The Court made clear that the information required by Article 5(2) does not have to be given in its entirety by the arresting officer at the very moment of the arrest".[138] This is questionable given that at the moment of arrest the reasons underlying the very same act are already known.[139] Interestingly, unlike the European Convention, the International Covenant on Civil and Political Rights under Article 9(2) singles out the moment of the arrest as the defining moment on which the arrestee must be informed of the reasons for his arrest.

The wording of Article 5(2) requires the information to be given promptly but not in detail. The sufficiency of the content of the information must be assessed in relation to the possibility of mounting an effective challenge to the detention. This leads to a lower level of detail as compared to the level required by the provision of Article 6(3)(a). The ECtHR has considered the information adequate when it is a "fairly precise indication of the suspicion" which enables the applicant to gain an idea of what he is suspected of.[140] It is worth mentioning that at this stage the information concerns the suspicion justifying the detention and not the charge.

In *Fox, Campbell and Hartley v. UK,* the applicants had been arrested under section 11 of the 1978 Act on suspicion of being a terrorist. The communication of the

132 *Van der Leer v. Netherland*, ECHR, no. 11509/85, 21 February 1990, para. 28.
133 Trechsel, above n. 13 at pp. 455-456.
134 *Fox, Campbell and Hartley v. The United Kingdom*, ECHR, no. 12244/86, 30 August 1990, para. 40.
135 Ibid.
136 *Kerr v. UK*, no. 40451/98, ECHR, 7 December 1999, *Partial Decision as to the Admissibility*.
137 *Skoogström v. Sweden*, European Commission for Human Rights, no 8582/79, 15 July 1983.
138 *Fox, Campbell and Hartley v. The United Kingdom*, ECHR, no. 12244/86, 30 August 1990, para. 40.
139 Grigori G., *La Tutela Europea dei Diritti dell'Uomo*, Milano, 1979.
140 *Dikme v. Turkey*, ECHR, no. 20869/92, 11 July 2000, para. 56.

provision underlying their arrest was the only information they received upon their arrest. The Commission found that "given the elementary nature of the safeguard, Article 5 para. 2 (Art. 5-2) places a direct burden on the arresting authorities to provide a detainee with adequate information as to the reasons for his arrest at the time of the arrest or as soon as is practicable thereafter". The ECtHR also stressed that the information given to the suspects upon their arrest had been insufficient because it concerned only the legal basis of the arrest. However, in reversing the finding of the Commission, the Court noted that from subsequent interrogations carried out by the police, the applicants had been put in the position to understand why they were arrested and therefore there was no violation of Article 5(2).[141]

This finding should be criticised as Article 5(2) guarantees the right to be informed, meaning the right to receive information from the authorities explaining the reasons for the arrest whereas the Court seems to have interpreted it as the right to be put in the position to infer the reasons for the arrest. The terminology employed in the judgment handed down in *Fox, Campbell and Hartley v. UK* corroborates this impression. The Court in fact stated that these interrogations "enabled the applicant to understand why they had been arrested" and this was sufficient to conclude that "the reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation".[142] As far as the position of the arrestee is concerned, there is a remarkable difference between being in the position where they are able to understand the reasons for the arrest, for example inferring them from the questions they were asked during the interrogation, and being informed by the authorities. The former scenario equates to the right to an educated guess whereas the provision of Article 5(2) seems to require something more active on the part of the authorities in bringing the relevant information to the arrestee.

This criticism was also expressed in *Murray v. UK*, a similar case where the ECtHR upheld the possibility of inferring the information required by Article 5(2) from the police interrogations.[143] In a partly dissenting opinion, the decision was described as reducing the meaning of article 5(2) "to such a low level that it is doubtful whether in fact it can, if it is adhered to in this form, have any possible concrete application in the future".[144]

The other provision assessed in the present analysis is Article 5(4), which reads as follows:

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 5(4) grants a detained person the right to pursue judicial review, which can speedily assess the lawfulness of his detention. The procedure does not allow the

141 *Fox, Campbell and Hartley v. The United Kingdom*, ECHR, no. 12244/86, 30 August 1990.
142 Ibid. at para. 41.
143 *John Murray v. UK,* ECHR, [GC], no. 18731/91, 8 February 1996, para. 77.
144 Ibid., *Partly Dissenting Opinion of Judge Misfud Bonnici.*

court called to review the detention "to substitute its own discretion for that of the decision making authorities" but it must assess both the procedural and substantive elements that "are essential for the lawful detention of a person according to Article 5(1)".[145] To enjoy the right a detainee does not have to present a *prima facie* case showing that "he stands any particular chance of success in obtaining his release".[146]

There is a partial overlap of the provisions of Article 5(4) and 6(1). The ECtHR acknowledged the connection between the two provisions but pointed out that they pursue different purposes. The first aims to protect against arbitrary detention by access to a speedy review of the lawfulness of the deprivation of liberty, whereas Article 6(1) aims to guarantee that the determination of the merits of the case occur in the context of a fair trial.[147] Because of the different scopes pursued by the provisions, Article 5(4) "contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness".[148]

The review must not only consider the procedural aspects but also enquire as to the reasonableness of the suspicion forming the basis of the arrest and the legitimacy of the aim pursued through the arrest and the consequent detention.[149] The ECtHR made clear what the Convention, and specifically Article 5(4) intends with the term "court". The latter does not necessarily have to be a judicial organ belonging to the judiciary but it must be impartial, independent of the executive and of the parties to the proceedings and possess all the guarantees appropriate to the kind of deprivation of liberty at stake. Furthermore, the body in question ought "not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful".[150] A merely advisory organ will not satisfy the requirement of Article 5(4).

The Court has clearly stated that in cases concerning the deprivation of liberty under Article 5(1)(c) the procedure assessing the lawfulness of the detention must include a hearing.[151] The necessity of a hearing in the procedure does not equate to the right to a public hearing. The procedure must be adversarial and the equality of arms between the prosecution and the detained person must be ensured.[152] In relation to the right to be assisted by a lawyer, although Article 5 does not mention it, in Öcalan v. Turkey, the ECtHR acknowledged that "the applicant could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer".[153] This finding suggests the applicability of the right to legal assistance during the proceedings regulated by Article 5(4).

The other important requirement of the procedure regulated by Article 5(4) is that the application must be dealt with "speedily". The promptness of the procedure

145 *Chahal v. The United Kingdom*, ECHR, [GC], no. 22414/93, 15 November 1996, para. 127.
146 *Waite v. UK*, ECHR, no. 53236/99, 10 December 2002, para. 59.
147 *Reinprecht v. Austria*, ECHR, no. 67175/01, 15 November 2005, para. 39.
148 *Lebedev v. Russia*, ECHR, no. 4403/04, 25 October 2007, para. 84.
149 See *ex multis Stasaitis v. Lithuania*, ECHR, no. 47679/99, 21 March 2002, para. 90.
150 See *ex multis, Weeks v. The United Kingdom*, ECHR, no. 9787/82, 2 March 1987, para. 61.
151 See *ex multis, Kawka v. Poland*, ECHR, no. 25974/94, 9 January 2001, para. 57.
152 See *ex multis, Garcia Alva v. Germany*, ECHR, no. 23541/94, 13 February 2001, para. 39.
153 Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 72.

under Article 5(4) entails the right to challenge the lawfulness of the detention immediately following the deprivation of liberty. The ECtHR has found a violation of Article 5(4) in cases where the applicants had not been allowed to file *habeas corpus* proceedings four days after their arrest.[154]

6.3 Applicability of Article 6 to the pre-trial stage

The applicability of Article 6 of the Convention to the pre-trial stage of criminal proceedings has been a much debated part of the doctrine and the ECtHR's jurisprudence. In relation to the latter, a more straightforward statement would have been welcome as it would have provided some clarity to a delicate legal issue, which instead has remained the subject of speculation and interpretation.

State parties have been determined to resist the support for application of article 6 to the pre-trial stage. The Commission in its earlier decisions shared the governments' approach to the issue. Article 6(1) refers to the "determination of any criminal charge" meaning the decision on the merit of a charge elevated by the authorities (*le bien-fondé de toute accusation en matière pénale*). Therefore, its applicability seems limited to the course of a trial with no bearing on the former stage of the proceedings.[155]

The Commission, while holding that Article 6(1) was applicable only to the stage of the proceedings at which the charge were to be determined, stated that Article 6(2) and (3) apply to "everyone charged with a criminal offense" and seemed to identify a different period (also before the trial stage), where these provisions operate. There appears to be a duplicity of the moments on which the different subparagraphs of Article 6 can be first considered applicable to criminal proceedings.[156]

In *Can v. Austria*, the Commission stated that the provisions of Article 6(3)(b) and (c) "are not necessarily limited in scope to the trial itself" and found their applicability to the pre-trial stage in the case concerned.[157] The Commission justified its findings by underlining the importance of the investigation stage in defining the framework in which the decision on the merits of the charge will take place. Consequently, it concluded that it is essential that the "basis for its [the suspect or the accused] defence activity can be laid already at this stage".[158] In addition, it underlined that the access to a lawyer, guaranteed by Article 6(3)(c), is needed even before trial as it safeguards "the control of the lawfulness of any measures taken in the course of the investigation proceedings, the identification and presentation of any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory, further assistance to the accused regarding any complaints which he might wish to make in relation to his detention concerning its justification, length and conditions".[159]

154 See *ex multis* , *De Jong, Baljet and Van den Brink v. Netherlands*, ECHR, no. 8805/79, 22 May 1984, para. 58.
155 *Adolf v. Austria*, European Commission of Human Rights, no. 8269/78, 8 October 1980, para. 64.
156 *X, Y and Z v. Austria*, European Commission of Human Rights, no. 5049,71, 5 February 1973. See Stavros, above n. 63 at pp. 54-55.
157 *Can v. Austria*, European Commission of Human Rights, no. 9300/81, 12 July 1984, para. 47.
158 Ibid. at para. 50.
159 Ibid. at para. 55.

In *Imbrioscia v. Switzerland* the ECtHR held that "the primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article (art. 6) has no application to pre-trial proceedings...other requirements of Article 6 (art. 6) - especially of paragraph 3 (art. 6-3) - may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them".[160] The Court elaborated a test ("the Imbrioscia test") to assess when the provisions of article 6 and particularly the provisions of Article 6(3), are applicable to a stage of the proceedings that precedes the trial. The applicability is therefore extended to the violations of article 6, occurring in the pre-trial stage, "in so far as the fairness of the trial is likely to be seriously prejudiced".[161]

In *Imbrioscia*, the Court held that the reasonable time mentioned in para. 1 of Article 6 begins from the moment at which a charge exists within the autonomous meaning given to it by the Convention.[162] We have seen that the time at which a charge comes into being can be narrowed down to the moment at which the situation of the suspect is "substantially affected", which in turn may coincide with a "date prior to the case coming before the trial court, such as.... the date when preliminary investigations were opened".[163] In an early case before the Commission, it was argued that the relevant moment in relation to the charge was not the opening of a preliminary investigation but the request by the prosecuting authorities for an investigation to be opened.[164]

The approach followed by the Court in the *Imbrioscia* case envisages a violation of article 6 in the pre-trial stage only when the violation is likely to prejudice the fairness of a trial as a whole. For example, where the criminal procedure of a state party attached negative inferences to the silence of the suspect at police questioning and there had been a restriction of the right to access a lawyer, the ECtHR concluded that there had been a violation of Article 6 of the Convention.[165] We have discussed the Öcalan case in which a violation of Article 6 was recognised in relation to the deprivation of the accused from legal assistance for a period of seven days during which he made self-incriminating statements, which then went on to become essential "elements of the indictment and the public prosecutor's submissions and a major contributing factor in his conviction".[166] Unlike these cases, the Court found no violation of Article 6 when the right to legal assistance was limited for a short period of time where the suspect had made no damaging admissions.[167]

160 *Imbrioscia v. Switzerland*, ECHR, no. 13972/88, 24 November 1993, para. 36.
161 Ibid.
162 Ibid.
163 *Eckle v. Germany*, ECHR, no. 8130/78, 15 July 1981, para. 73.
164 *Huber v. Austria*, European Commission of Human Rights, no. 4517/70, 8 February 1973, Separate Concurring Opinion of Judge Opsahl.
165 See *John Murray v. UK,* ECHR, [GC], no. 18731/91, 8 February 1996.
166 See above, paragraph 3.3. Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 140.
167 See *Brennan v. The United Kingdom*, ECHR, no. 39846/98, 16 October 2001.

In relation to the defendant's right to question a witness, regulated by Article 6(3)(d), Trechsel contends that the *Imbrioscia* case "can only be understood as meaning that, as a matter of principle, there is a right to be present and to question witnesses from the beginning of the proceedings".[168] However, the ECtHR on this issue seems to put more emphasis on the right to examine witnesses during trial rather than envisaging a temporal extension of such right throughout the entire criminal proceedings.

The Human Rights Handbook Series of the Council of Europe reports that "the guarantees provided for in Article 6 apply not only to the court proceedings, but also to the stages which both precede and follow them".[169] It goes on to affirm that the guarantees cover pre-trial investigations carried out by the police in criminal cases. Trechsel recognises the applicability of article 6 to the pre-trial stage in relation to all the procedural steps that are directly relevant to the decision on the merit of the case and identifies the police inquiry as the moment at which these guarantees should begin.[170]

It is worth mentioning the different approach followed by the Human Rights Committee (HRC) in the regulation of the applicability of Article 14 (provision on the fair trial correspondent to Article 6 of the Convention) of the International Covenant on Civil and Political Rights (ICCPR). The HRC, in fact, explicitly states the applicability of Article 14 of the Covenant to the criminal proceedings as a whole, including the pre-trial stage.[171] In the General Comment on Article 14 of the ICCPR, the HRC clarified that the right to be informed of the charges begins from the moment at which during the preliminary investigation "a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such".[172] Also in relation to the right to legal assistance, the HRC has often found a violation where the suspect had been deprived of the assistance of a lawyer while being detained before the formal issue of charges against him.[173] The difference with the European Convention lies in the explicit recognition of the applicability of Article 14 of the ICCPR to the pre-trial stage. The drafters of the Convention declined to regulate the pre-trial stage through specific provisions and preferred to leave it to the interpretation offered by the case law of the ECtHR.

6.4 Applicability of Article 6 to habeas corpus proceedings[174]

During the preliminary investigations, a suspect may be arrested and detained by the police to ensure, *inter alia*, that the offence is not repeated and that the suspect

168 Trechsel, above n. 13 at p. 309.
169 Mole, N., and Harby, C., Council of Europe Human Rights Handbook Series, *A Guide to the Implementation of Article 6 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2001, p.8.
170 See Trechsel, above n. 13 at p. 32.
171 See Pedrazzi M., *The Right to Defence in Pre-Trial Procedures under the Covenant and under the European Convention*, EU-China Human Right Network, available at http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/dso406.php
172 Human Right Committee, General Comment on Article 14, para. 8. Available at http://www2.ohchr.org/english/bodies/hrc/comments.htm
173 See Stavros, above n. 63 at p. 58, footnote 64, quoting, *inter alia*, HRC, Vasiliskis v. Uruguay, Machado v. Uruguay, Caldas v. Uruguay.
174 The habeas corpus proceedings are proceedings aimed at determining whether a person is imprisoned lawfully and whether he should be released from custody.

does not interfere with the investigation. We have seen that Article 5(4) contains specific procedural guarantees pertaining to the issue of the deprivation of liberty that are distinct from the ones envisaged by Article 6(1).

In *Neumeister v. Austria*, the Commission held that Article 6(1) does not apply to proceedings challenging the lawfulness of pre-trial detention.[175] Recently, the ECtHR reiterated that applying the first paragraph of Article 6 to proceedings challenging the lawfulness of the pre-trial detention "would be against its wording as their subject matter is not the determination of a criminal charge".[176] However, the ECtHR has also shown some leeway for this inflexible interpretation.

In 2001, the Court decided on three cases where Germany was found to be in violation of Article 5(4).[177] These cases concerned similar situations where the lawyer for the defence had been denied access to the prosecutor's file containing material relevant for challenging the pre-trial detention. The Court stated several important principles. It held that "a court examining an appeal against detention must provide the guarantees of a judicial procedure".[178] The procedure must always respect the principle of the equality of arms between the prosecutor and the detained person and it must be adversarial.[179] Consequently, denying the defence counsel access to the prosecutor's file violates the equality of arms, as it hampers the defence's effectiveness in challenging the detention.[180]

In *Reinprecht v. Austria*, the Court concluded that the public character of the hearing granted under Article 6(1) did not apply to *habeas corpus* proceedings. However, it also acknowledged the existence of an overlap between the guarantees recognised by Article 5(4), especially in relation to the access granted to the case file, the right to legal assistance and the rights provided for in Article 6.[181] Therefore, it can be argued that provisions of article 6, other than the one referring to the public character of the hearing, such as the right to disclosure and the right to legal assistance might find application to proceedings challenging the legitimacy of pre-trial detention.

For proceedings to be adversarial, in accordance with Article 6 of the Convention, disclosure of each party's observations and evidence must occur and each party must have the opportunity to comment on them.[182] The Court stressed that "it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings".[183] Finally, the ECtHR held that due to

175 *Neumeister v. Austria*, European Commission of Human Rights, no. 1936/63, 27 May 1966, p. 89.
176 *Reinprecht v. Austria*, ECHR, no. 67175/01, 15 November 2005, para. 48.
177 *Lietzow v. Germany*, ECHR, no. 24479/94, 13 February 2001, *Garcia Alva v. Germany*, ECHR, no. 23541/94, 13 February 2001 and *Schöps v. Germany,* ECHR, no. 25116/94, 13 February 2001.
178 *Garcia Alva v. Germany*, ECHR, no. 23541/94, 13 February 2001, para. 39, *Schöps v. Germany,* ECHR, no. 25116/94, 13 February 2001, para. 44 and *Lietzow v. Germany*, ECHR, no. 24479/94, 13 February 2001, para. 44.
179 Ibid.
180 Ibid.
181 *Reinprecht v. Austria*, ECHR, no. 67175/01, 15 November 2005, para 38.
182 See *Garcia Alva v. Germany*, ECHR, no. 23541/94, 13 February 2001, para. 39, *Schöps v. Germany,* ECHR, no. 25116/94, 13 February 2001, para. 44 and *Lietzow v. Germany*, ECHR, no. 24479/94, 13 February 2001, para. 44.
183 Ibid.

the "dramatic impact of the deprivation of liberty" the proceedings challenging the pre-trial detention "should meet to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial such as the right to an adversarial procedure".[184]

In *Frommelt v. Liechtenstein*, the ECtHR held that it is not always necessary that the proceedings challenging pre-trial detention are characterised by the respect for the guarantees of Article 6(1).[185] Nonetheless, it stated that in such proceedings the detained person "should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation".[186]

What emerges from these judgments is that the Convention not only guarantees the right of the suspect to challenge the lawfulness of his detention but it also ensures that these proceedings constitute a thorough, fair and effective review. The review is characterised by the defence's informed participation. Consequently, and also in relation to these proceedings, the accused must be granted "to the largest extent possible" the basic requirements of a fair trial, which include the guarantees of Article 6(3). The tension clearly arises in relation to the competing interests of the safeguard of the right of the detained person and the protection of the effectiveness of the preliminary investigations.

Interestingly, in relation to this issue the position of the HRC is again more straightforward as it recognises the applicability of the right to a fair trial [Article 14(1) of ICCPR] to *habeas corpus* proceedings, which are considered as a part of the whole proceedings.[187]

6.5 Concluding remarks

The pre-trial stage of criminal proceedings is not regulated by any specific provision of the Convention except Article 5, which is only applicable to instances where the liberty of the suspect or the accused has been restricted. This lack of regulation creates room for potential abuse of the suspect or the accused's vulnerable position. The pre-trial stage is an essential part of criminal proceedings, which is able to influence the outcome of the trial. Therefore, it also seems essential that a person who is being investigated in relation to a crime must be granted minimum rights in the pre-trial stage, regardless of his liberty or detention. These guarantees are those envisaged by Article 6(3) which in turn are crucial elements of the notion of a fair trial. The ECtHR, while acknowledging that the need for the efficiency of pre-trial investigations may imply the need for non-disclosure of some information, stated that it could not be done "at the expenses of substantial restrictions on the right of the defence".[188] Information essential for the determination of the lawfulness of the pre-trial detention should be disclosed to the defence in an appropriate

184 Ibid.
185 *Frommelt v. Liechtenstein,* ECHR, no. 49158/99, 24 June 2004, para. 29.
186 Ibid.
187 See UN Human Rights Committee, *Kelly v. Jamaica*, Communication No. 253/1987, 8 April 1991.
188 ECtHR, *Garcia Alva v. Germany*, 13 February 2001, para. 42.

manner. The authorities cannot support the prosecution's interest when seeking to maximise effectiveness of the investigation if this deprives the essential guarantees provided for by Article 5(4) of their meaning.

It seems feasible that the applicability of the guarantees provided for in Article 6(3) is ensured at least in relation to those moments of the preliminary investigations that are able to influence and affect the fairness of the following stage. However, the "*Imbrioscia* test" should be interpreted broadly considering that a restriction on the defence's rights in such a delicate stage is *per se* highly likely to generate potentially devastating consequences for the fairness of the trial.

The ECtHR has expressly recognised the applicability of the guarantees of Article 6(3)(a)(b) and (c) to the pre-trial stage under the condition that the fairness of the trial is likely to be prejudiced by their violation. It follows that a suspect, from the moment that his situation is substantially affected, has the right to be informed of the charges against him, to have adequate time and facilities to prepare his defence and to be assisted by a lawyer if the condition that the denial of such rights might produce adverse effects jeopardising the fairness of the trial is met. What these rights entail in relation to disclosure will be discussed below.

V. Disclosure of information in the case law of the European Court of Human Rights

Introduction

> The analysis carried out in the previous chapter showed that in order to be fair and compliant with Article 6(1) of the European Convention on Human Rights, criminal proceedings must grant to the defence and the prosecution the opportunity to present their case without being placed at disadvantage to one another. At the same time, it must afford the parties the opportunity to have knowledge of and comment upon the evidence adduced and the observations submitted by the other parties. Moreover, Article 6(3) grants to everyone charged with a criminal offense several rights, which also "reflect certain of the aspects of the notion of a fair trial in criminal proceedings".[1]

It is within this framework and upon this understanding that the disclosure of information has been tackled by the European Court of Human Rights. Many questions arise in relation to the right to disclosure. In what provision of the Convention should disclosure be collocated? What information is the object of disclosure? Who should decide upon instances where non-disclosure is sought on public interest grounds? How should such a procedure be regulated in order to be fair? How should the friction between the right to disclosure and the public interest in non-disclosure be handled? What should the court see and not see? The answer to some of these questions can be found in the jurisprudence of the ECtHR and, although reluctant to provide general definitions, it has provided several important principles which should guide national jurisdictions in the management of the issue of disclosure.

The European Court of Human Rights acknowledged that the right to disclosure, although not explicitly stated in the provision of Article 6 of the Convention, is an inherent element of the right to a fair trial. Nevertheless, the right to disclosure is not an absolute right and it must be reconciled with competing interests such as, *inter alia*, the protection of witnesses, national security and the integrity of the investigations. Such competing interests can justify, where strictly necessary, a restriction of the right to disclosure. However, any restriction must be counterbalanced in a way that guarantees the overall fairness of the proceedings.

The ECtHR has dealt with the legal issue of disclosure in relation to applications claiming a violation of different provisions and principles embodied in Article 6 of the Convention. The right to disclosure in fact, can be read as an element of the broader right to a fair trial from different perspectives. For example, lack of disclosure has been found to have occurred and thereby breaching the principle of the equality of arms between the parties or in violation of the right to an adversarial

1 *Artico v. Italy*, ECHR, no. 6694/74, 13 May 1980, para. 32.

trial. In addition, disclosure is the most important of the facilities an accused must have at his disposal to prepare his defence in accordance with article 6(3)(b).

The disclosure of information may be categorised differently in accordance to its object. It can refer to the reasons for a suspect's arrest, the nature and cause of the accusations, the evidence gathered by one party, the identity of witnesses, an advisory opinion or access to the dossier. In addition, disclosure may be more or less extensive in relation to the different stages of the criminal proceedings. Therefore, different elements may influence the management of this issue in criminal proceedings.

The conflict between one party's interests (usually the defence) to have certain information disclosed and the protection of the public interests (such as national security, safeguard of police investigation, protection of witnesses at risk etc.) is another crucial aspect of the regulation of disclosure.

The first part of this section will attempt to give an account of the way in which the European Court of Human Rights has perceived the disclosure of information in its case law. Specifically, an attempt is made to show that disclosure has been recognised as an element of the right to a fair trial from different angles of the provisions and principles of article 6 of the Convention. Paragraphs 1 and 2 illustrate how the jurisprudence of the ECtHR has read the legal issue of disclosure through the lenses of the different provisions of Article 6 of the Convention.

The second part of this section will examine the case law of the Strasbourg Court in relation to several crucial aspects of the issue of disclosure. In the former section, we have seen that the Court is reluctant to provide general definitions applicable to every case and prefers to proceed on a case-by-case approach. This philosophy applies also to the disclosure of information whose regulation, as we have seen in the previous chapters, differs, sometimes significantly, from country to country. However, through the analysis of the selected jurisprudence, an attempt is made to highlight the essential principles that can be inferred from the Court's rulings in relation to several interesting elements of the disclosure of information. Specifically, the subject matter of disclosure, the relation between the non-disclosed material and the issue of actual prejudice, the managing of the conflict between the right to disclosure and the public interest as well as the possibility to remedy in appeal the lack of disclosure are tackled in paragraphs 3 to 7. This analysis will be a useful tool for assessing the rules regarding the disclosure of information in the national and international criminal procedural systems examined in this book.

1. Article 6(1) and the disclosure of information

1.1 Introduction

On several occasions, the ECtHR has examined and assessed the issue of disclosure of information in relation to the overall fairness of criminal proceedings under the provision of article 6(1) and its inherent principles. The case law of the Strasbourg Court creates a set of guiding principles in relation to the disclosure of information

which should inspire the national judicial systems of the states party to its regulation.

The Court affirmed that "it is a requirement of fairness under paragraph 1 of Article 6... that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings".[2] This is an essential rule, which clarifies the solid nexus between the fairness of proceedings and the disclosure of information. In other words, a criminal trial cannot be fair in the absence of disclosure.

1.2 The Equality of arms and disclosure

It has been illustrated that the principle of the equality of arms between the parties to criminal proceedings, although not explicitly stated in the provision, is one of the fundamental elements of the right to a fair trial. The Strasbourg Court has had the opportunity to deal with the correlation between the disclosure of information and the equality of arms in several cases.

In the case of *Foucher v. France,* as we saw in chapter III, the ECtHR was called to scrutinise the defendant's right of access the dossier.[3] On 24 July 1991, Mr. Foucher and his father, French nationals, were summoned to appear before the Argentean Police Court under the direct committal procedure regulated by Article 531 of the French Code of Criminal Procedure. They were charged with a fifth class minor offence, namely of having used insulting and threatening words and behaviour towards public service employees (two national game and wildlife wardens). Mr. Foucher decided to represent himself. On 25 July 1991, his mother went to the registry of the police court seeking access to the case file in order to make copies of the documents it contained. The prosecutor denied such request stating that copies could not be issued to individuals except through a lawyer. Then the applicant and his father sought access to the dossier. The prosecutor informed them that copy of official reports could not be issued to individuals.

On 2 October 1991, at the hearing before the Police Court, Mr. Foucher and his father complained that the proceedings against them were unlawful. They claimed that the denial of access to the case file amounted to a breach of article 6 of the European Convention. The Police Court upheld Mr. Foucher's claim that there had been a violation of the rights of the defence. It stated that the defendants should have been allowed access to their case file in order to prepare their defence. On 16 March 1992, the Caen Court of Appeal reversed the Police Court Judgment stating that article 6 of the Convention did not grant the accused access to the case file. On 15 March 1993, the Court of Cassation upheld the Court of Appeal judgment.

Before the ECtHR, the applicant complained that his rights of defence had been infringed as he was denied access to his file and did not obtain copies of the

2 *Edwards v. The United Kingdom*, ECHR, no. 13071/87, 16 December 1992, para. 36.
3 *Foucher v. France*, ECHR, no. 22209/93, 18 March 1997.

documents contained therein and this amounted to, in his view, a violation of article 6(1) taken together with article 6(3). Access to these facilities was essential in order to prepare an effective defence able to challenge the warden's official report, which was good evidence in the absence of proof to the contrary and it was the sole piece of evidence supporting the case against him. The ECtHR found that the applicant should have been afforded access to the *dossier* as it was necessary for setting up an effective defence against the accusations brought against him. Specifically, it was necessary in order to challenge the official report concerning him. The Court concluded that "as he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of Article 6 para. 1 of the Convention taken together with Article 6 para. 3".[4]

The analysis of the above-mentioned case shows that the ECtHR perceives non-disclosure as affecting the overall fairness of a criminal trial through its inevitable impact on the equality of arms. The lack of disclosure, in the form of denying the accused access to the case file, can amount to a violation of the principle of the equality of arms putting one party at a disadvantage *vis* à *vis* the other. If a defendant is denied access to the case file, especially in inquisitorial systems in which the trial will be based upon its content, he will not be able to present his case. The Court reached the same conclusion in applications that concerned the non-disclosure of a relevant document to the defence.[5]

The assessment of the issue of disclosure against the principle of the equality of arms is however, only one of the possible ways in which the ECtHR brings the issue of disclosure under the broader umbrella of Article 6 of the Convention.

1.3 Right to an adversarial trial and disclosure

Another inherent element of the right to a fair trial is the adversarial nature that must characterise criminal proceedings. We have discussed that the core of this principle lies in the right of the parties to criminal proceedings to have knowledge of and comment upon all the evidence adduced by the other party in order to display an active role in influencing the court's final decision. The disclosure of information lies at the core of this guarantee. The ECtHR, on various occasions, recalled the obligations stemming from the right to an adversarial procedure and in addition held that article 6(1) requires that "the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused".[6]

The case law dealing with the right to an adversarial trial and disclosure can be roughly divided into two groups each dealing with a different form of disclosure

4 Ibid. at para. 36.
5 See *Walston v. Norway*, ECHR, no. 37372/97, 3 June 2003, para 58. In this case the Strasbourg Court held that the omission to communicate a relevant document to the accused, which in turn made it impossible for him to respond to it, had put him at disadvantage *vis* à *vis* the other party.
6 *Ex multis*, *P.G. and J.H. v. The United Kingdom*, ECHR, no. 44787/98, 25 September 2001, para. 67.

obligations.[7] The first group covers situations where the prosecution has not met its obligation to disclose evidence to the defence.[8] In several cases concerning the United Kingdom, the Strasbourg Court tackled the prosecutor's tendency to withhold material from disclosure to the defence. The general rule stated by the Court affirmed that the fairness of criminal proceedings depends, *inter alia*, on the prosecutor disclosing all the material against or in favour of the accused.[9] The prosecutor's duty to disclose is also intertwined with the existence of competing interests which might outweigh the right to disclosure.

The second group of ECtHR case law dealing with the right to an adversarial trial and disclosure concerns situations where the defence has not been given an opportunity to reply to a submission addressed to the Court by the office of the public prosecutor. This lack of disclosure assumes a different connotation.

The case of *J.J. v. The Netherlands* is of assistance in showing the path followed by the ECtHR when dealing with these situations.[10] The applicant had received an assessment of supplementary income tax for the year 1984 together with a fine. He had lodged an appeal, which had been declared inadmissible because the court registration fee had not been paid. The case reached the Dutch Supreme Court (*Hoge Raad*). The ECtHR was called to examine the procedure followed before the *Hoge Raad* by which the advocates-general to the Supreme Court submit an advisory opinion to the Court that is not disclosed to the defence. A crucial role was played by the function of the advocates-general to the Supreme Court which according to the Dutch Judicial Organisation Act (*Wet op de rechterlijke organisatie*), at the time, belonged to the organisation of the Procurator-General's department (*openbaar ministerie*) and acted as deputies to the Procurator-General. Their advisory opinion to the Supreme Court "takes the form of a learned treatise", which includes references to relevant case-law, legal literature and a recommendation, which is not binding, to uphold or reject points of appeal".[11] In *J.J. v. The Netherlands,* the advisory opinion, although not taking position on the defence's arguments, expressed the view that the judgment impugned was correct and "gave extensive reasons why the alternative submission should be rejected."[12] The applicant did not receive a copy of the advisory opinion

Before the ECtHR the applicant claimed that article 6(1) had been violated insofar as he was not able to have knowledge of the submission of the advocate-general and to respond to it. The Court noted the similarities between the procedure under examination and the procedure before the Belgian Court of Cassation, which had

7 See Trechsel S., *Human Rights in Criminal Proceedings*, 2006 Published to Oxford Scholarship on line available at http://www.oxfordscholarship.com/oso/public/content/law/9780199271207/toc.html, p.91-94.

8 These situations will be analyzed also and more in depth while addressing the management of competing interests.

9 *Edwards v. The United Kingdom*, ECHR, no. 13071/87, 16 December 1992, para. 36.

10 *J.J. v. The Netherlands*, ECHR, no. 21351/93, 27 March 1998. In the previous chapter the case of *Borgers v. Belgium, ECHR, no. 12005/86, 30 October 1991*, has been examined to illustrate the departure of the ECtHR from its previous orientation towards the role of the Advocate General. On this bulk of jurisprudence see, *ex multis, Goc v. Turkey*, ECHR, no. 36590/97, 11 July 2002, *Van Orshoven v. Belgium, ECHR, no. 20122/92, 26 June 1997, Voisine v. France, ECHR, no. 27362/95, 8 February 2000, Vermeulen v. Belgium, ECHR, [GC], no. 19075/91, 20 February 1996*.

11 *J.J. v. The Netherlands*, ECHR, no. 21351/93, 27 March 1998, para. 29.

12 Ibid. at para. 14.

already been assessed in previous cases.[13] Further to this, it acknowledged that the purpose of the advisory opinion is to safeguard the consistency of the case law of the Supreme Court and that the Procurator-General's department has a clear duty to act with the strictest impartiality.

However, the ECtHR attached great importance to the role of the advocates-general and to the content and effects of his submissions. It considered that the latter, although objective and justified in law was aimed at advising (and therefore influencing) the Supreme Court. Consequently, the defendant should have been in the position to know its content and decide whether or not to respond to it. The Court concluded that "the fact that it was impossible for the applicant to reply to it before the Supreme Court took its decision infringed his right to adversarial proceedings".[14] The right to have knowledge of and comment on all evidence adduced or observations filed applied also to submissions filed by an independent member of the national legal service.

From this judgment, it is possible to infer the orientation of the Strasbourg Court towards this type of non-disclosure. In addition, it makes clear the connection between disclosure and the right to an adversarial trial. The Court considers that it is only for the defence to decide whether or not a submission deserves a response. This principle also applies in cases where the submission in question originates from an independent body. By not disclosing the advisory opinion, the procedure affects the defence right to have knowledge of it and to assess the opportunity to present arguments to the Supreme Court in relation to its content. The influencing potential of the recommendation included in the opinion is not counterbalanced by the representation to the judges of the defence position on the opinion itself. Non-disclosure therefore leads to the infringement of the right to an adversarial trial.

Moreover, in *Kerojärvi v. Finland* the ECtHR had already stated that the right to a fair trial requires "that the applicant himself should have been given the opportunity to assess their [of the documents not transmitted to him] relevance and weight and to formulate any such comments as he deemed appropriate".[15] The Court stressed the importance of the defence's assessment of non-disclosed submissions as the only possibility for the defence to make an informed decision on the strategy to follow (to respond to them or not).

The Strasbourg Court seems to attach no weight to the relevance of the submission for the outcome of the proceedings. In *F.R. v. Switzerland*, the ECtHR made clear that "the effect which the observations actually had on the judgment ...is of little consequence".[16]
Also the possibility that the content of the non-disclosed submission had been

13 Ibid. at para. 42, referring to *Vermeulen v. Belgium, ECHR, [GC], no. 19075/91, 20 February 1996* and *Van Orshoven v. Belgium, ECHR, no. 20122/92, 26 June 1997*.
14 *J.J. v. The Netherlands*, ECHR, no. 21351/93, 27 March 1998, para. 43.
15 *Kerojärvi v. Finland*, ECHR, no. 17506/90, 19 July 1995, para. 39.
16 *F.R. v. Switzerland*, ECHR, no. 37292/97, 28 June 2001.

repeated in a public hearing was considered of no relevance.[17] In the case of *Lanz v. Austria*, as with the cases examined above, the defence had not been served with a submission that the Procurator General had addressed to the court. The government argued that because an oral hearing was held where the Senior Public Prosecutor essentially repeated his written submissions, there was no need to provide these observations to the applicant. The Court relied on the case of *Brandstetter v. Austria* (judgment of 28 August 1991), where it had found a breach of Article 6 § 1 on account of the failure of the Court of Appeal to communicate observations to the accused that had been filed by the Senior Public Prosecutor. In that particular case the Court did not attach any weight to the fact that upon Mr. Brandstetter's appeal hearings were held before the Court of Appeal. The ECtHR found that such a procedure violated article 6(1) and stated that "in a system where the filing of written observations by the parties before a hearing is not excluded and where a court, therefore, when deliberating on a case has at its disposal in addition to oral statements made at a hearing written statements filed beforehand, a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent".[18]

As a concluding remark, in relation to this second group of Strasbourg jurisprudence on the right to an adversarial trial and disclosure, it is interesting to stress that in cases such as *J.J. v. The Netherlands* where the submission to the Court "takes the form of a learned treatise", which includes references to relevant case-law, legal literature and a recommendation, no competing interest can be invoked to corroborate the claim for non-disclosure as the material on which the submission is based has already been disclosed.

In the previous chapter, it was illustrated how the principle of the equality of arms and the right to an adversarial trial seem to lack a precise identity and definition in the case law of the ECtHR which has given the impression that they are intertwined if not interchangeable in their application. This approach is also followed in relation to the case law on the disclosure of information.

For example in *Užukauskas v. Lithuania*, the ECtHR found that the decision-making procedure adopted before the Lithuanian courts had not complied "with the requirement of adversarial proceedings or equality of arms and did not incorporate adequate safeguards to protect the interests of the applicant" and concluded that a violation of article 6(1) had occurred.[19] This case, although not a criminal case, assists in highlighting the Court's approach towards the disclosure of information in relation to the equality of arms principle and the right to an adversarial trial.

The applicant had been listed in a database containing information gathered by law-enforcement authorities and as a consequence his licence to keep firearms had been revoked and he had been ordered to hand in his weapons to the police. The applicant's challenge to the decision before a national court was dismissed

17 *Lanz v. Austria*, ECHR, no. 24430/94, 31 January 2002, paras. 61-62.
18 Ibid. at para. 62.
19 *Užukauskas v. Lithuania,* ECHR, no. 16965/04, 6 July 2010, para. 51.

on the basis of classified material that the court received from the police that the applicant was not allowed to examine. The Court held that "the applicant's listing in the operational records file had been lawful and reasoned, in view of the information about the applicant held by the police".[20] The Supreme Administrative Court upheld the decision and stated, *inter alia*, that the evidence in question was classified as a state secret and could not be disclosed to the applicant although the court had reviewed it.

The ECtHR noted that in order to assess whether the applicant's name had been listed in an operational records file without proper reason the judges had to examine among other things, "the reason for the police operational activities and the nature and extent of the applicant's suspected participation in alleged crime".[21] The information in the operational file was therefore crucial to the court's decision. The ECtHR highlighted that the applicant had asked several times, in vain, for the disclosure of the file. Consequently, he had been precluded from familiarising himself with the evidence against him on which the court had based its findings. As mentioned above, the ECtHR concluded that the decision-making procedure adopted before the Lithuanian courts had not complied "with the requirement of adversarial proceedings or equality of arms and did not incorporate adequate safeguards to protect the interests of the applicant".[22]

The way in which the Court made reference to the two principles in the judgment seems to suggest that it does not consider them so fundamental as to confer them an independent definition in relation to the disclosure of information. Consequently, it is not uncommon that a lack of disclosure of information can be considered by the Court to have affected the fairness of criminal proceedings by compromising the equality of arms and/or the adversarial nature of the proceedings itself.

2. Article 6(3) and the disclosure of information

2.1 Article 6(3)(a)

As far as the guarantee of article 6(3)(a) is concerned, it is evident that the knowledge of the accusation against an individual is an essential element for an effective defence. This can also be considered as an initial disclosure of the essence of the case against the suspect. The previous section illustrated how the cause and the nature of the accusation are the subject of the right to be informed regulated by article 6(3)(a). The cause of the accusation concerns the acts the accused is alleged to have committed on which the accusation is based, whereas the nature pertains to the legal qualification given to these material facts. The ECtHR "considers that in criminal matters the provision of full, detailed information to the defendant concerning the charges against him – and consequently the legal characterisation that the court might adopt in the matter – is an essential prerequisite for ensuring

20 Ibid. at para. 12.
21 Ibid. at para. 49.
22 Ibid. at para. 51.

that the proceedings are fair".[23]

What is important, particularly in civil law jurisdictions, is the moment from which this right operates. The issue is complicated by the friction between the individual's right to know that he is being investigated and the interest in ensuring the preliminary investigation is efficient and on occasion, secret. The provision of article 6(3)(a) states that a person must be informed of the accusation against him. The accusations do not necessarily amount to an official criminal charge, which are usually formalised in the indictment. The latter can be drafted at the end of the preliminary investigation and therefore if the indictment were assumed to be the object of the provision it would imply that the suspect could remain ignorant of the investigation until the very last moment. This scenario would jeopardise the effectiveness of the individual's right to adequate time and facilities to prepare his defence, especially in systems that attach great value to the results of the pre-trial investigation. A possible conclusion is therefore that the provision of article 6(3)(a) often finds its first application at a moment that precedes the notification of the indictment.[24]

A central element of this guarantee in relation to disclosure is the certainty of the legal characterisation of the accusation. If during the proceedings the conduct of the alleged perpetrator is characterised differently from a legal point of view, the new legal characterisation must be the object of timely information to the accused in order to allow him to adjust his defence strategy accordingly. Therefore, an initial disclosure of the nature and cause of the accusation is not sufficient. Disclosure must be reiterated in any instance where different legal characterisations of the accusation occur.

The Court tackled this issue, *inter alia*, in the case of *Sadak and others v. Turkey* where the applicant had been charged with the crime of treason against the integrity of the state but on the day of the judgment, 8 December 1994, the charge had been re-characterised by the prosecutor as belonging to an armed organisation set up for the purpose of destroying the integrity of the state.[25] The National Security Court had asked the defendants to prepare their defence on the spot against this new charge, namely belonging to an illegal armed organisation. It had then dismissed their application for additional time to prepare their defence against the new charge. The applicants submitted that they had not been able to defend themselves properly and present their evidence against the new charge.

In assessing the alleged violation of article 6(3)(a) the Court considered "that in criminal matters the provision of full, detailed information to the defendant

23 *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999, para. 52.

24 Legal scholars seem to support this position. See among others, Van Dijk and Van Hoof, *Theory and Practice of the European Convention of Human Rights*, Kluwer Law International, 1998; Stavros S., *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*, Martinus Nijhoff, Publishers 1993; Harris D.J., O'Boyle M. & Warbrick C., Law *of the European Convention on Human Rights*, Oxford University Press, 2014. On the other hand, Trechsel contends that the object of article 6(3)(a) is only the indictment. See Trechsel, above n. 7 at p. 200.

25 *Sadak v. Turkey,* ECHR, no. 29900/96, 17 July 2001. See also *Péllissier and Sassi v. France*, ECHR, [GC], no. 25444/94, 25 March 1999.

concerning the charges against him – and consequently the legal characterisation that the court might adopt in the matter – is an essential prerequisite for ensuring that the proceedings are fair".[26] Moreover, the ECtHR stated that "sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused right to prepare his defence".[27] The Court, therefore, ascertained whether it was foreseeable for the accused that such change in the legal characterisation of the offence might occur. It answered in the negative considering that the two crimes were different in both their material and their mental constituent elements. It concluded that a violation of the defence's right to be informed of the nature and causes of the accusation against him and to have adequate time and facilities to prepare his defence had occurred. However, from the reasoning employed by the Court, it seems arguable that if the accused could have foreseen the change in the legal characterisation in light of the constituent elements of the crimes the ECtHR would have not found a violation.[28]

2.2 Article 6 (3)(b)

Article 6(3)(b) grants every person charged with a criminal offence the right to have adequate time and facilities at his disposal in order to prepare his defence. The disclosure of information is the most relevant among the "adequate facilities" the accused has the right to enjoy in the preparation of his defence. It seems inevitable that in order to have a concrete opportunity to mount an effective defence the accused must not only be informed of the accusation against him (article 6(3)(a)) but he must also have knowledge of the material at the basis of the case against him. In this regard, the Strasbourg Commission stated that under article 6(3)(b) "the accused must have the opportunity to organize his defence in an appropriate way and without restrictions as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings".[29] It appears logical that in order to be able to put all relevant arguments before the court the accused must be granted disclosure of the material forming the foundation of the case against him.

In *Jesper v. Belgium*, the ECtHR discussed the nature of the facilities a defendant should enjoy in accordance with article 6(3)(b).[30] In this case, the applicant was a former examining judge at the court of Ghent who had been found guilty and was sentenced to twenty years hard labour for the attempted murder of his wife, aggravated theft, forgery, slanderous accusations and the carrying firearms. The applicant complained that the prosecutor had not made several reports drawn up by the police available in the trial and that a "special folder" containing certain documents and letters sent by third parties to the prosecutor had not been inserted

26 *Sadak v. Turkey,* ECHR, no. 29900/96, 17 July 2001, para. 49.
27 Ibid. at para. 50.
28 On this point see *De Salvador Torres v. Spain*, ECHR, no. 21525/93, 24 October 1996.
29 *Can v. Austria*, European Commission of Human Rights, no. 9300/81, 12 July 1984, para. 53.
30 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981.

in the case file that he did have access to.

The Commission pointed out that the facilities that the defendant must be granted to prepare his defence include "the opportunity to acquaint himself with the results of investigations carried out throughout the proceedings".[31] Moreover, it clarified that although not explicitly mentioned in the text of the Convention, the right for the defendant to have access to the prosecution file can be inferred from the provisions of article 6(3)(b).[32] In consideration of the diversity of the criminal systems of the state parties to the Convention the term "facilities" cannot have its scope restricted to acts performed during a particular period of the criminal proceedings. The Commission therefore concluded that any investigation carried out in connection with criminal proceedings and their results form part of the "facilities" envisaged by article 6(3)(b). In sum, "article 6(3)(b) recognizes the right of the accused to have at his disposal, for the purposes of exonerating himself or obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities".[33] If the relevant element is a document then access to that document is a necessary facility that must be granted to the defendant.

The case of *Jesper v. Belgium* illustrates what seems to be some sort of overlap between the provision of 6(3)(b) and the principle of the equality of arms when disclosure of information is at stake. In this case we have seen that the main question the Commission had to answer was whether the prosecutor's non-disclosure of certain material had violated the right of the defence under article 6(1) and/or article 6(3)(b).[34] The Commission recalled that the principle of the equality of arms "could be based not only on article 6(1) but also on article 6(3), especially sub-paragraph (b)".[35] This approach seems to suggest an almost interchangeable application of article 6(1) and 6(3)(b) in relation to disclosure. Trechsel, in relation to the Court's approach towards the two paragraphs of article 6 and disclosure, notes that "the distinction between 'lack of fairness by reason of a failure to disclose' or by a lack of 'adequate facilities for the preparation of the defence' is particularly difficult". [36]

2.3 Article 6(3)(c)

The issue of the disclosure of information also has bearings in relation to article 6(3)(c). Specifically, although the right to legal assistance is usually linked to the accused's right to have adequate facilities to prepare his defence or, more generally, to the right to an adversarial hearing, it is contended that the right to legal assistance entails, as an implicit element, the right to disclosure of the evidence against the accused.

Several considerations seem to corroborate such an assumption. We have seen that

31 Ibid. at para. 56.
32 Ibid.
33 Ibid. at para. 58.
34 Ibid. at para. 52.
35 Ibid. at para. 55.
36 Trechsel, above n. 7 at p. 88.

the ECtHR has clarified that the Convention guarantees rights which are practical and effective and not theoretical or illusory and this is particularly so in relation to the rights of the defence.[37] In addition, it is settled jurisprudence of the Strasbourg Court that the mere assignment of a lawyer to an accused is not *per se* sufficient to ensure the effectiveness of the assistance he may afford to his client.[38]

The core elements of the legal assistance for an accused person in a criminal trial can be divided into two parts. First, the lawyer plays a supervisory role. He puts his skills and knowledge of the procedure at the service of the accused in order to guarantee that the authorities respect his rights during the proceedings. This first aspect also involves moral and psychological support that a professional can offer to his client in a situation of distress. The second and more constructive aspect of the legal assistance is to ensure that the accused can play an active role in the proceedings influencing its course and outcome.[39]

Bearing these considerations in mind, several questions arise. Can a defence be considered effective if the role played by the lawyer is limited to being the guardian of procedural regularity? How can a lawyer influence the course of the proceedings in a favourable way to his client? Is the disclosure of the case against the accused, both in relation to the charges and the evidence gathered, a *condicio sine qua non* to ensure that the accused can play an active role in the proceedings?

The accused has the right, both practical and effective, to legal assistance. The defence's effectiveness is not related to the outcome of the proceedings, which depends on the circumstances of the case and the ability and the skills of the lawyer, but concerns the possibility to influence the course of the proceedings. In other words, the appointed lawyer must be put in a position to be effective so to be an influencing factor in the development of the proceedings. Therefore, answering the first of the above questions, a defence counsel whose only task is to verify that the correct procedure is followed by the authorities, cannot be considered effective. Assigning that kind of legal assistance and maintaining that it complies with the procedural requirements would strip it of any practical meaning. In fact, the defence counsel would be playing a passive role with no opportunity to ensure the accused person a constructive attitude throughout the proceedings. This scenario would contradict the ECtHR jurisprudence that stresses that the legal assistance serves the interest of justice and fairness as it enables "the applicant to make an effective contribution to the proceedings."[40]

In relation to the possibility to influence the proceedings and to the disclosure of information, it follows from the above that to make an effective contribution to the proceedings the defence lawyer must be able to confer with his client in

37 See *Imbrioscia v. Switzerland*, ECHR, no. 13972/88, 24 November 1993, para. 38. See also *Artico v. Italy*, ECHR, no. 6694/74, 13 May 1980, para. 33, Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 133.

38 Öcalan *v. Turkey,* ECHR, [GC], no. 46221/99, 12 May 2005, para. 135, *Salduz v. Turkey*, ECHR, [GC], no. 36391/02, 27 November 2008, para. 51, *Imbrioscia v. Switzerland*, ECHR, no. 13972/88, 24 November 1993, para. 38.

39 See Trechsel, above n. 7 at pp. 245-247. Trechsel identifies four different aspects of the legal assistance: the technical, the psychological, the humanitarian and the structural aspect.

40 *Granger v. The United Kingdom*, ECHR, no. 11932/86, 28 March 1990.

private and to have access to the case file. It is only through the knowledge of the prosecutor's case and the indication and instructions obtained by the accused in relation to the case file that a lawyer can carry out an informed and effective defence. Consequently, it is argued that, although not the central element of the guarantee of article 6(3)(c), it is possible to consider the disclosure of information as an element which contributes to the effectiveness of the right to legal assistance.

2.4 Article 6(3)(d)

In order to best prepare for the examination of a witness called before criminal proceedings by the opposite party it is necessary to know the identity of the witness in question. This is relevant not only to test the reliability of his testimony on the events but also to be able to assess his personal credibility through a thorough analysis of his background. However, it is not always possible to disclose the identity of witnesses because competing interests may suggest otherwise. This problem is experienced almost exclusively by the defence with particular reference to undercover police officers who were actively engaged in the investigation, witnesses at risk of reprisals and victims who need to be afforded special protection.

The ECtHR accepted the possibility that the information in relation to identity and whereabouts etc. of witnesses might not be disclosed to the defence when competing interests so require. It also made clear that once such non-disclosure takes place the defence is obliged to work in a challenging environment, which should not be the defining part of the proceedings. Therefore, appropriate measures to counterbalance the restriction of the defence rights should be put in place by the competent authorities. This is a general principle that applies to disclosure and in the specific issue of anonymous witnesses finds its implementation through the adoption of techniques that might accommodate the need to test the witness evidence with the necessity to preserve his anonymity.

In *Kostowski v. Netherlands,* the ECtHR summarised the problem of non-disclosure of the identity of witnesses stating that "if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious".[41]

Where the preservation of anonymity is considered reasonable and justified by the competent court it remains to be seen whether the defence has been granted procedural measures sufficient to counterbalance the difficulties stemming from the non-disclosure of the witness' identity. This was the assessment made by the ECtHR in the case of *Doorson v. The Netherlands* where it found that there were sufficient reasons, in the particular circumstances of the case, not to disclose

41 *Kostovski v. The Netherlands*, ECHR, no. 11454/85, 20 November 1989, para. 42.

the identity of the witnesses referred to as Y15 and Y16. Furthermore, the Court noted that the anonymous witnesses were questioned at the appeals stage by an investigating judge in the presence of the counsel for the applicant (who remained unaware of their identity). The defence counsel was able to ask any question he considered in the interest of the defence except those, which might lead to the disclosure of the witnesses' identity. Consequently, the ECtHR concluded that no violations of article 6 had occurred as the measures undertaken were sufficient to counterbalance the difficulties caused by the non-disclosure.[42]

3. What material should be disclosed and when?

As anticipated in the introduction, the second part of the chapter tackles several defining characteristics of the issue of disclosure. However, before turning to this analysis it seems important to provide the answer to the following question: What is the meaning of the general notion of information? Or in other words, what is the subject matter of disclosure? The case law of the ECtHR assists in finding an answer to this question.

The procedural stage of criminal proceedings is an important element when assessing what the object of disclosure is. The subject matter of disclosure differs according to the stage of the criminal proceedings in which it occurs. Therefore, a (procedural) chronological approach must be followed to single out what the Convention and the ECtHR case law have identified as information that must be disclosed.

The previous section described how article 5 of the European Convention grants specific rights to persons deprived of their liberty because of, *inter alia*, a reasonable suspicion of having committed an offence.[43] Among the guarantees that a person arrested enjoys is the right to be informed of the reasons for his arrest and the charge against him.[44] The disclosure obligation in this phase clearly only concerns the reasons for a person's arrest. This is understandable considering that the arrest is a measure taken during a preliminary investigation where evidence is still being gathered in order to assess the reasonableness of the suspicion upon which the suspect is detained. This kind of disclosure concerns the information about the "essential legal and factual grounds for his arrest".[45] The ECtHR has examined the sufficiency of the information disclosed in relation to the possibility of mounting an effective challenge to the detention in the proceedings regulated by article 5(4) and aimed at assessing the lawfulness of the detention. Specifically, the Strasbourg Court has considered the information adequate when it is a "fairly precise indication of the suspicion", which enables the applicant to gain an idea of what he was suspected of.[46]

42 *Doorson v. The Netherlands*,ECHR, no. 20524/92, 26 March 1996.
43 Article 5(1)(c).
44 Article 5(2).
45 *Fox, Campbell and Hartley v. The United Kingdom*, ECHR, no. 12244/86, 30 August 1990, para. 40.
46 *Dikme v. Turkey*, ECHR, no. 20869/92, 11 July 2000, para. 56.

Moving to article 6(3)(a), the Convention envisages the disclosure of the nature and cause of the accusation to every person charged with a criminal offence. Once again, at this stage the disclosure obligation concerns the accusations against a person, which in turn enables an effective defence. In the previous section it was noted that the cause of the accusation concerns the acts the accused is alleged to have committed and on which the accusation is based, whereas the nature pertains to the legal qualification given to these material facts. The ECtHR illustrated that the information must be disclosed in detail and it must always be sufficient for the accused to be able to "understand fully the extent of the charges against him with a view to preparing an adequate defence".[47] Therefore, the information must clearly state the facts underlying the charge and the circumstances, place, time and any accomplices the accused allegedly has.

The provisions of article 5(2) and 6(3)(a) envisage a disclosure obligation incumbent upon the authorities and aims to provide a framework within which further disclosure takes place. The latter, in its more classical notion, includes material, documents, witness statements and more general access to the case file. Stavros refers to two different kinds of rules of disclosure: those which provide the defence with an appraisal of the prosecutor's case before trial, and those which provide the defence with the material in the prosecutor's possession that is relevant for forming the defence.[48]

Among the facilities contemplated in article 6(3)(b), disclosure is certainly the most relevant for the defence. In *Jesper v. Belgium*, the Commission made clear that the facilities include the opportunity for the person charged with a criminal offence "to acquaint himself, for the purpose of preparing his defence, with the results of investigations carried out throughout the proceedings".[49] The disclosure of information, intended as knowledge of the results of the preliminary investigation, in principle involves all the material gathered by the authorities. It is difficult to draw a complete list of the possible fruits of an investigation and in turn, of what the object of disclosure should be. However, a non-exhaustive list includes the transcripts of the interrogations that the police, the investigating and the prosecuting authorities have carried out with the defendants and the witnesses, pictures of the crime scene, reports of searches, experts' opinions, documents seized, maps, transcripts of recorded conversations etc.

The Commission stated that any investigation "carried out in connection with criminal proceedings and the findings thereof...form part of the facilities within the meaning of article 6(3)(b) of the Convention".[50] In principle, all material collected during the investigation should be the object of disclosure to the defendant as long as it is relevant for the preparation of his defence (unless competing interests conflict with full disclosure). The Strasbourg Court clarified this principle stating

47 *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, para. 60.
48 Stavros, above n. 24 at p. 178.
49 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, para. 56.
50 Ibid.

that "if the element in question [collected by the authorities] is a document, access to that document is a necessary facility" if it concerns an act of which the defendant is accused.[51]

The relevance of a specific item collected by the authorities can only be evaluated with reference to the circumstances of the case in question. The case of *Papageorgiou v. Greece*, provides a good example of the way in which the specific circumstances of a case are determinant for assessing the relevance of an item.[52] The applicant, a former employee of the Bank of Greece, was convicted of fraud for having forged seven cheques, which were debited to the account for Greek Railways. Mr. Papageorgiou had requested the original seven cheques in all three domestic proceedings. The request was never allowed. The ECtHR noted that at no stage of the proceedings were the domestic courts able to assess the conformity of the original cheques from the copies given. It concluded that in relation to the circumstances of the case at stake "the production of the original cheques was vital to the applicant's defence since it would have enabled him...to show that the instructions for the payment in issue had been given by employees of the bank other than him, which would have compelled the judges to conclude that the accusation of fraud was unfounded".[53]

Continuing with the analysis of the subject matter of disclosure, we have already discussed that a submission to the Court filed by the opposing party or even an advisory opinion originating from an independent member of the national legal system can be the object of disclosure.

Interestingly, disclosure may also concern elements and circumstances which, although not included in the prosecution's case might be relevant for the accused's defence. Having said that, there are elements that bear no relevance to the prosecution's case, which will not be used at trial. For example, interviews with persons whose position was initially considered suspicious but in the course of the investigation transpired to be extraneous to the events. However, what is irrelevant from the perspective of the prosecutor can be evaluated differently in the context of the defence's strategy. The inversion of points of view allows a completely different evaluation of the same event. While a fruitless search of a house is merely an unfortunate step for the prosecutor in the course of the investigation, from the defence's perspective it can be an element able to corroborate its version of events.

A good example can be found in the case of *Edwards v. The United Kingdom*, where the applicant was convicted, *inter alia*, on one count of robbery and two counts of burglary. The jury reached the verdict by a majority of ten votes to two. One more vote in favour of the applicant and he would have been acquitted. The main evidence at trial consisted in the oral admission that Mr. Edwards had allegedly made to the police officers in three separate interrogations. The applicant had not signed such statements and contended that the police had concocted them.

51 Ibid. at para. 58.
52 *Sadak v. Turkey,* ECHR, no. 29900/96, 17 July 2001.
53 Ibid. at para. 37.

The victim of the robbery was an 82 year old woman who gave a statement to the police describing the perpetrator and stating that she would be able to recognise him again. She was not called as a witness although her statement was read to the jury. Following sentencing, the applicant petitioned the Secretary of State for the Home Department complaining about the conduct of the police officers who had investigated his case and given testimony at trial. During the independent police investigation that followed, two issues arose. First, the police officers' testimony that no fingerprints had been found on the crime scene was not correct, in fact two fingerprints belonging to the next-door neighbour had been found. Second, it appeared that during the investigation the police had shown two volumes of pictures of possible burglars to the victim, including Mr. Edwards, and she did not pick out the applicant from the photographs. Both facts had been withheld from the defence. The report, which ended the independent police investigation, recommended disciplinary action for the police officers but was not disclosed to the defence on the grounds of public interest immunity.

The applicant appealed the judgment. The Appeal Court did not hear the police officers and did not have at its disposal the independent police investigation's report. However, it was aware of the shortcomings detected by that investigation. It rejected the defence arguments that the abovementioned shortcomings in the prosecution case had affected the verdict (which the defence considered unsafe and unsatisfactory) and consequently dismissed the appeal.

The ECtHR found no violation of article 6(1) of the Convention as in its view the defects in the first instance trial were subsequently remedied before the Court of Appeal. However, the Court acknowledged that the lack of disclosure of the circumstances related to the fingerprints and the failure of the victim to pick the applicant when showed photographs constituted shortcomings of the first instance trial. In one of the two dissenting opinions appended to the judgment[54] it was stated that "the failure of the police to disclose these facts to the defence and to the jury fundamentally vitiated the fairness of the trial". [55]

Finally, the identity of the witnesses that a party intends to call to give testimony at trial should also in principle be told to the other party in order to allow it to prepare for cross-examination in accordance with article 6(3)(d). However, as has been discussed in this section, there may be exceptions to disclosure when anonymity is necessary to protect the witnesses, *inter alia*, from the risk of possible reprisals. The difficulties faced by the defence because of the non-disclosure of the witnesses' identity must be counterbalanced by the procedure followed by the judicial authorities. The Court is in charge of assessing the efficacy of such measures.[56]

Summing up we can conclude that through the analysis of the ECtHR case law the

54 Dissenting opinions of Judge Pettiti and Judge De Meyer. They both considered that the procedure followed before the Appeal Court was not sufficient to remedy the unfairness caucused by the lack of disclosure. Specifically, they criticized that the Court of Appeal not only did not review all the evidence of the case, but took for granted that "the jury would not have been influenced to act other than they did if they had had the full story".

55 Dissenting opinion of Judge De Meyer.

56 *Sadak v. Turkey*, ECHR, no. 29900/96, 17 July 2001.

obligation to disclose, whether they rest on the authorities or on the parties and according to different stages of the proceedings, include but are not limited to, the following elements:

- The reasons for the arrest of a person due, *inter alia*, to the suspicion he has committed an offence;
- Detailed information of the acts a person charged with a criminal offense is alleged to have committed and of the legal qualification given to these material facts;
- "Access" to or "discovery" of the relevant material, gathered during the preliminary investigations, which may vary according to the specific circumstances of the case;
- Submissions to the court by the other party to the proceedings and advisory opinions filed by an independent member of the national legal system;
- Facts, events and circumstances that, although not included in the case file, might be relevant for the accused's defence;
- Identity of witnesses called to give testimony at trial, unless their anonymity is necessary to protect them from the risk of possible reprisals.

4. The inherent problem of disclosure

There are two main definitions of the verb to disclose in the English vocabulary. The first one is "to make something publicly known, especially after it has been kept secret", and the second is "to show something by removing the thing that covers it".[57] In both cases, the verb stresses the passage of something from secrecy to the knowledge of one or more individuals. It pertains to the action of unveiling something in order to making it available to the knowledge of others who were not aware of it. To disclose information in criminal proceedings, using its literal meaning, implies that the information is not known by the party asking for its disclosure. It is in this simple consideration the inherent problem of disclosure in criminal proceedings lies and which can be summarised by a question: how can somebody request and justify the disclosure of specific material if he is not aware of its existence or its content?

In criminal proceedings, the problem is felt particularly, but not exclusively, by the defence. Specifically, considering that all the material gathered during the preliminary investigation is in the hands of the authorities, how can the defendant know what should be disclosed to him? Two major problems become clear in this regard. The first concerns the actual knowledge of the existence of the material in question and the second is related to the demonstration of the relevance of such material for the defence's case.

57 See Longman Dictionary of Contemporary English.

In relation to the first problem, it will always be necessary to show some trust in the righteous conduct of the prosecuting authorities in carrying out their disclosure obligations. Specifically, they must be expected and believed "to disclose to the defence material evidence, which contains such particulars which could enable the accused to exonerate himself or have his sentence reduced".[58] A distinction must be made between material which becomes part of the case-file or is used at trial and material which is not included in the file and is not used at trial. In relation to the second the defence holds a rather weak position as the reliance on the prosecution authorities is at its most acute.

However, asides from the inevitable reliance on the authorities to identify the material to be disclosed, the defence can also play a constructive role in the individuation of such material which is not included in the case file. The central element for enabling the defence to play such a role effectively seems to be the unrestricted access to legal assistance that can follow the investigation. By monitoring the unfolding of the preliminary investigations, the defence will be aware of the steps taken by the authorities and their potential outcome. For example, by knowing of, and possibly participating in a search of a house it will be possible to know the material gathered and assess its possible relevance to the defence's case. The unrestricted access to legal assistance is a necessary tool for following the investigation's developments. Moreover, the defendant is the person who has the best knowledge of his conduct and often the circumstances of the case. Consequently, he can instruct his lawyer as to what could have been found by the authorities in relation to acts of the investigation. This is not an exhaustive list but it shows that although the role played by the authorities in disclosure is still determinant, there is some room for the defence in the categorisation of material possibly held by the authorities whose disclosure can be requested.

In relation to the need to show relevance of the material whose disclosure is pursued, the ECtHR has considered that the right to disclosure does not equate to an absolute right to ask for an extensive general disclosure of all the material held by the authorities. Therefore, some kind of proof that the material in question is necessary for the preparation of the defence must be given. Indeed, it would be difficult to conceive of a system of disclosure in which the defence can claim an unlimited and unqualified right to inspect the case material as such a system would be prone to be abuse by defence lawyers. The difficulties arise when the fairness of the threshold required must be assessed.

In *Jespers v. Belgium* the applicant had complained, *inter alia*, that the lack of disclosure of the content of a so-called "special folder" internal to the prosecuting authorities had violated his rights of defence.[59] He contended that the folder might contain reports not made available to the defence and letters from third parties concerning the trial, which should have been disclosed if such documents suggested an exoneration of the accused.

58 *Natunen v. Finland*, ECHR, no. 21022/04, 31 March 2009, para. 43.
59 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, paras. 46-47.

The Commission assessed the complaint and noted that the applicant could "not be expected to specify from amongst the documents in the special folder concerning his case those which were relevant and should have been made available to him for inspection since the very cause of his complaint is that he never had access to that special folder". However, it stressed that the defence had not been able, even after having been allowed to inspect three other files produced by the prosecutor, to give even the "slightest evidence" that the special folder in question included a document whose content might have been necessary for the preparation of the defence.[60] It concluded that, "in the absence of any conclusive evidence" no violation of article 6(3)(b) had occurred.

In *Bendenoun v. France*, the ECtHR stated that in relation to the request of disclosure of certain material in the possession of the prosecutor "it is necessary, at the very least, that the person concerned should have given, even if only briefly, specific reasons for his request".[61] In the case at stake, the Court noted that the accused had already admitted the customs offence in parallel proceedings and in the absence of any precise arguments supporting his contention that the undisclosed material was necessary to counter the charge of tax evasion, no violation of the applicant's rights of defence was found. In *Natunen v. Finland*, discussed above, the ECtHR reiterated that the accused may be "expected to give specific reasons for his request [in relation to disclosure] and the domestic courts are entitled to examine the validity of these reasons".[62]

These examples show that the Strasbourg Court requires defendants to back up their request for disclosure by meeting a *prima facie* argument as to the relevance of such material to their case. In *Jespers* the Court found that even though the applicant had established the existence of a "special folder" in light of the failure to prove that the material contained therein could be of exculpatory nature it was not sufficient. Stavros questions whether the Court was fair in considering that a *prima facie* case had not been met by establishing the existence of the internal "special folder".[63] He argues that in a situation where the competent authorities might have relevant material suggesting a violation of the defendant's rights, the benefit of doubt should operate in his favour and consequently the threshold of proof should be lowered. It seems reasonable to argue that if the defence succeeds in proving a *prima facie* case as to the existence and relevance of the material object of the disclosure request, then it should be up to the prosecutor to prove either that such material does not exist or that it is irrelevant for the defence's case.

So far, we have discussed the issue from the perspective of the defence. However, the case law of the ECtHR shows that it can also have bearings in relation to the prosecutor's position. Specifically, the Court has dealt with the link between the privilege against self-incrimination and the compulsion to deliver documents to prosecuting authorities in the context of a criminal investigation. This request can

60 Ibid. at para. 62.
61 *Bendenoun v. France*, ECHR, no. 12547/86, 24 February 1994, para 52.
62 *Natunen v. Finland*, ECHR, no. 21022/04, 31 March 2009, para. 43.
63 Stavros, above n. 24 at p. 179.

be considered as a form of compelled disclosure of material held by the defence and, although in a criminal investigation such compulsion does not *per se* violate the defence's rights, the authorities must meet certain conditions in order to avoid an infringement of the defence's right against self-incrimination.

In the case of *Funke v. France*, the ECtHR found a violation of article 6(1) because the customs authorities had secured the applicant's conviction in order to obtain certain documents that they believed must exist although they were unsure.[64] Using the wording of the ECtHR, the customs authorities "being unable or unwilling to procure them [the documents] by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed".[65]

The Court seems to be influenced by the case law of the American Supreme Court according to which a suspect may be compelled by the authorities to deliver existing documents only if the authorities know of their existence and of their possession by the accused.[66] Differently such compulsion would equate to an infringement of the right against self-incrimination to the extent that the existence of the documents would be admitted by the accused through their delivery.[67] In other words, a random and baseless request made by the prosecutor means that the existence of the documents in question depends on the (compelled) will of the accused to produce them.

In *J.B. v. Switzerland*, the Swiss tax authorities requested the applicant produce all the documents in his possession concerning two companies in which he had invested. These investments had not been declared in the relative taxation period and tax evasion proceedings had been commenced against the applicant. The latter admitted to have invested in these companies and to have not properly declared the income in his tax forms but refused to submit the requested documents. When the applicant failed to produce the documents, the authorities imposed four penalties on him.

Before the ECtHR, the authorities were not able to prove their knowledge of the existence of the documents that the applicant had been required to produce.[68] The Court considered that the fact that the authorities had asked for the production of the documents on eight different occasions proved that they were not aware of their existence. The Court concluded that the applicant was compelled to produce documents that would lead to his incrimination. What the Court condemns is not the obligation to produce documents but the speculative nature of the authorities' request, which leads to its conflict with the right against self-incrimination. What remains unclear is whether it is sufficient that the authorities prove their knowledge of the existence of the relevant documents and their possession by the accused or whether it is necessary to show knowledge of their content.

64 *Funke v. France*, ECHR, no. 10828/84, 25 February 1993, para. 44.
65 Ibid.
66 See Peçi I., *Sounds of Silence*, Wolf Legal Publishers, 2006, p. 56.
67 Ibid.
68 *J.B. v. Switzerland*, ECHR, no. 31827/96, 3 May 2001.

5. The issue of prejudice

There is a link between the disclosure of information in criminal proceedings and the actual prejudice that the non-disclosure could cause the defence. Specifically, it is interesting to investigate whether the ECtHR requires the defence to establish that non-disclosure caused actual prejudice to its case or it deems sufficient that it demonstrates the relevance of such material to the defence case. In the first scenario, the problem arises considering the position of the accused who is called to show to have suffered some kind of prejudice in his defence without knowing the nature of the evidence withheld.

The two concepts are similar and sometimes difficult to distinguish. If something is relevant to the defence's case it follows that its non-disclosure will have a potential prejudicial effect. In other words, relevance implies the possibility of prejudice in case of non-disclosure. However, proving that a piece of information is relevant to the defence's case seems to have a lower threshold than proving that its non-disclosure caused actual prejudice to the defence. The difference lies in the adjectives "potential" and "actual" which characterise the substantive "prejudice". To prove the relevance of an item of material to the defence's case means that (once it has been established) refusing its disclosure could cause prejudice. On the other hand, having to prove the actual detrimental effect suffered by the defence as a result of non-disclosure means having to show that the defence's case has suffered concrete and real damage.

In the case of *Korellis v. Cyprus*, the ECtHR seems to focus on the relevance (of the time and facilities) to the preparation of the defence of the accused rather than on the actual prejudice. Consequently, it seems to be sufficient for the accused to have a *prima facie* case in relation to the alleged relevance of the material whose precise content cannot be known at the time of the complaint, in order to substantiate his demand for disclosure.[69]

The applicant was accused of rape and committed for trial before an Assize Court. The defence asked for the disclosure of a number of relevant documents in the prosecution's possession and further requested that a forensic examination of the complainant's knickers be carried out. The Assize Court granted the requests but the Supreme Court subsequently quashed the order. During the proceedings at the Assize Court, the prosecutor disclosed several documents requested by the defence but objected to the defence's request to carry out forensic tests. Before the ECtHR, the applicant complained that he had been deprived of the opportunity to have his own scientific experts examine an important piece of evidence (the complainant's knickers) which was in the prosecutor's possession. The Court noted that "even if the applicant does not have to show actual prejudice to the defence due to the non-examination of the knickers, he still has to show the relevance of such an examination to the case against him".[70] In the case at stake the applicant failed to

69 *Korellis v. Cyprus,* ECHR, no. 54528/00, 7 January 2003, para. 35.
70 Ibid.

do so and failed also to substantiate his argument that such an examination was of relevance to his defence.[71]

Furthermore, the ECtHR reaffirmed that "in any event the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality".[72] Harris, O'Boyle and Warbrick, who consider that "the procedural deficiency in itself is a breach of the right to a fair trial", also subscribe to this approach.[73] When the lack of disclosure is examined by the ECtHR in the context of the principle of the equality of arms and the right to an adversarial trial, the Court seems to consider the actual prejudice irrelevant. In the case of *Walston v. Norway*, the ECtHR assessed the consequences of the lack of disclosure of a bank statement to the defence.[74] The Court found that it "does not need to determine whether the omission to communicate the document caused the applicants prejudice; the existence of a violation is conceivable even in the absence of prejudice. It is for the applicants to judge whether or not a document calls for their comments".[75] The Court concluded that "the mere fact that the applicants were unable to respond meant that they were placed at a disadvantage *vis-à-vis* the Bank in the High Court proceedings, in a manner at variance with the fair hearing guarantee in Article 6 § 1 of the Convention".[76]

However, in *Kremzow v. Austria*, where the issue at hand was the disclosure of the name of the judge rapporteur to the Attorney General's Office and not to the defence, the Court concluded that this procedural imbalance was not enough to consider the proceedings unfair. It found that the "defence was not in any way prejudiced by the difference".[77] Trechsel contends that "some sort of detrimental effect" must be shown by the defence in order to reach a conclusion of unfairness.[78]

There seems to be a way of reconciling these apparently conflicting interpretations by focusing on the subject matter of the disclosure in relation to the fairness of the proceedings. Different kinds of imbalances may occur during a criminal trial leading to different conclusions on the overall fairness of the proceedings. Not every imbalance between the prosecutor and the defence will amount to the unfairness of the whole proceedings *per se*, unless it is coupled with a negative effect on the defence's case. The nature of the imbalance must be the focus of the assessment. For example, neglecting to communicate the name of the judge rapporteur to the defence (as in the *Kremzow* case), presumably will have a limited effect on the fairness of proceedings and a negative effect on the defence should be shown in order to conclude otherwise. Nonetheless, a submission made by the prosecutor to the court has a different weight in relation to the proceedings' fairness if the defence

71 Ibid.
72 *Bulut v. Austria*, ECHR, no. 17358/90, 22 February 1996, para. 49.
73 Harris, O'Boyle & Warbrick, above n. 24 at p. 414.
74 *Walston v. Norway*, ECHR, no. 37372/97, 3 June 2003, para. 58.
75 *Korellis v. Cyprus*, ECHR, no. 54528/00, 7 January 2003, para. 35.
76 *Walston v. Norway*, ECHR, no. 37372/97, 3 June 2003, para. 58.
77 *Kremzow v. Austria*, ECHR, no. 12350/86, 21 September, 1993, para. 75.
78 Trechsel, above n. 7 at p. 99.

is not granted the opportunity to respond. The latter omission can be considered in *re ipsa* violating the principle of the equality of arms insofar as "it is a matter for the defence to assess whether a submission deserves a reaction".[79] The inherent prejudice of the imbalance lies in the defence being deprived of the opportunity to assess the need for a reaction to the prosecutor's submission.

In relation to the right to adequate time and facilities envisaged in article 6(3)(b) Trechsel argues that it seems to be necessary that the defence demonstrate some kind of prejudice has taken place.[80] Stavros suggests that the Court should first assess whether, as a matter of fairness, a specific facility should have been granted to the accused. If the answer is *prima facie* negative then the defence will be asked to prove the existence of actual prejudice. On the contrary, when the answer is positive it would be for the respondent government to prove the lack of actual prejudice.[81]

6. The competing interests

According to the ECtHR case law on disclosure, the general rule is that the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused.[82] However, the Court has also stated that the right to disclosure is not an absolute right and has acknowledged the existence of competing interests, which might justify a restriction of the defence's entitlement to disclosure.[83] The importance of the public interest in crime prevention and punishment cannot be underestimated and must be weighed against the rights of the defence when there are instances where, because of the public interest, disclosure of certain material is denied by the prosecution. The need to protect the identity of an undercover agent, to preserve the secrecy of a police method or to shield a witness who fears reprisal are just a few examples of a public interest that might be invoked to justify the non-disclosure of specific relevant material.

On the one hand, the need to protect and guarantee the respect of the right of every person charged with a criminal offence to a fair trial is fundamental. On the other hand, the public interest requires that in every democratic society an effective crime control policy is enforced and its effectiveness must be safeguarded. The tension between these interests is self-evident. None of them can outweigh the other and consequently a fair equilibrium is the goal aimed for while assessing their relevance in a specific case.
The ECtHR case law has singled out several fundamental principles that might assist in the attempt to confer the correct relevance to the competing interests at stake in cases concerning disclosure. These principles emerged through several judgments in which the Strasbourg Court examined the rules of disclosure in the

79 *Lanz v. Austria*, ECHR, no. 24430/94, 31 January 2002, para. 58. The same line of argument would apply to the participation of a figure affiliated to the prosecution to the deliberation of the court in the absence of the defence.
80 See Trechsel, above n. 7 at p. 210.
81 See Stavros, above n. 24 at p. 184.
82 *Ex multis* see *Jasper v. The United Kingdom*, ECHR, [GC], no. 27052/95, 16 February 2000, para. 51.
83 Ibid. at para. 52.

United Kingdom's criminal procedure.

In examining these cases the Court made clear what it sees as its role and to what extent it was willing to reassess the national courts' decisions. The ECtHR explained that it is not its task to assess whether the non-disclosure was indeed strictly necessary. Such examination belongs to the domestic courts, which are in charge of assessing the evidence before them. The goal of the Strasbourg Court is "to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused".[84]

As we have seen in chapter one, on 16 February 2000, the Grand Chamber of the ECtHR delivered three judgments in relation to three cases involving the United Kingdom, where all the applicants had complained that non-disclosure by the prosecution of relevant evidence on the ground of public interest immunity had denied them a fair trial. They consequently contended that a violation of Article 6(1) and 6 (3) (b) and (d) of the European Convention on Human Rights had occurred in their criminal proceedings.

The first of these three judgments was delivered in the case of *Rowe and Davis v. The United Kingdom*, where the applicants were convicted of murder, assault and robbery in relation to three different incidents that occurred on the night of 15/16 December 1988. The prosecution during their trial at the Crown Court had unilaterally withheld, without notifying the court or the defence, evidence in relation to the fact that a witness had claimed a reward in order to testify against the accused. This information was relevant to the reliability of that specific witness. Only during the appeal trial the Court of Appeal had on two different occasions considered the relevant material and had ruled that the it should not be disclosed. The ECtHR first recalled two important principles established by its precedent jurisprudence. First, that there are legitimate circumstances where it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence, which are strictly necessary, are permissible under Article 6 (1).[85] Second, that in order to guarantee the accused a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[86]

The Court's main finding in this judgment is that the "procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 (1)".[87]

84 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000, para 62.
85 See *Van Mechelen and Others v. The Netherlands*, ECHR, no. 21363/93, 23 April 1997, para. 58.
86 Ibid. at para. 54. See also *Doorson v. The Netherlands*, ECHR, no. 20524/92, 26 March 1996, para 72.
87 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000, para 63.

The Court stated that the trial judge is in the best position to decide the fairest weight to be attributed to the competing interests and to decide whether non-disclosure is strictly necessary in a specific case as he is "versed in all the evidence and issues of the case".[88] Consequently, the ECtHR concluded that the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial in violation of article 6(1) of the Convention.

In the case of *Natunen v. Finland,* the ECtHR made clear that this principle, which applies to the prosecutors, applies *a fortiori* to the police and the investigating authorities when they assess the relevance to the defence's case of undisclosed material with no involvement of the defence or a third party.[89] The applicant had been charged, together with two other co-defendants, with aggravated drugs offences consisting of importing a large quantity of amphetamine into Finland from Estonia. Mr. Natunen's defence had asked the police whether all the phone calls between the codefendants had been included in the pre-trial investigation. He also asked for a written confirmation that the telephone recording of all the conversations recorded between the three defendants could not be disclosed based on the confidentiality of such material. The police charted that all the phone calls, which pertained to the case, had been included in the file and also that they could not disclose the requested material because it was confidential. The codefendants were found guilty and sentenced to six and a half years' imprisonment. The Court relied heavily on the recordings of telephone conversations to draw the conclusion that there had been a common understanding in relation to the plan to obtain drugs. The three codefendants appealed the judgment and asked the Appeal Court to order the disclosure of all the conversations recorded as, in their opinion, it would have shown that the dealing among them was related to other matters and did not concern drugs. The partial and selective recording attached to the pre-trial investigation file had misrepresented the association among the three. A hearing was held and the prosecutor communicated that the residual metering of the phone calls could not be disclosed as, according to the law in force at the time, it had been destroyed.[90] Consequently, the Court of Appeal did not render a decision on the issue of disclosure and upheld the impugned sentence. The Supreme Court refused leave to appeal the Court of Appeal Judgment.
The ECtHR made clear that "a procedure whereby the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements of Article 6 § 1".[91] Such violation was even graver in the case at stake considering that the prejudice

88 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000.
89 *Natunen v. Finland*, ECHR, no. 21022/04, 31 March 2009.
90 Chapter 5a, sections 12 and 13 of the Coercive Measures Act, as in force at the time of the case, provided that the head of the investigation (or another official by his order) had to check the recordings at the earliest convenience and that, after they had been checked, recordings containing information which was not related to the offence covered by the authorization had to be destroyed. After its amendment in 2003 the provision now regulates the destruction of the superfluous material only after the case has been resolved with legally binding effect or removed from the docket.
91 *Natunen v. Finland*, ECHR, no. 21022/04, 31 March 2009, para. 47.

suffered by the defence because of non-disclosure could not be remedied due to the destruction of the undisclosed material.

The other two cases decided by the Grand Chamber of the ECtHR on 16 February 2000 were *Jasper v. The United Kingdom* and *Fitt v The United Kingdom*.[92] In both cases, during the trial, the prosecution made *ex parte* applications to the trial judge to withhold material in its possession on the ground of public interest immunity. The defences were notified of the application and could argue their cases before the trial judge but they had no knowledge about the category of material involved.[93] The trial judges, in both cases, analysed the material and ruled that it should not be disclosed. No reasons for this finding were given to the defence.

The Court found no violation of the right to a fair trial and the principle of the equality of arms because, unlike in the case of *Rowe and Davis*, the *ex parte* applications had been made to the trial judge who "was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial."[94] The Court was satisfied that the defence were kept informed and were permitted to make submissions and participate in the decision-making process as far as it was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.

The Grand Chamber composed of the same seventeen judges delivered very tight verdicts in both cases, which were reached by nine votes to eight. The eight judges who did not accept the conclusions drawn by the majority appended dissenting opinions to the judgment.

Some of the dissenting judges were not satisfied that the procedure followed by the English courts had been considered compliant with the principles of adversarial proceedings and equality of arms.[95] They argued that the defence had been excluded by the decision making process which led to the exclusion of the material from disclosure. The fact that the defence could state their cases before the judges could not remedy the injustice of the procedure. The defence, in fact, were unaware of the nature of the evidence at stake and "it was purely a matter of chance whether they made any relevant points".[96] The judges felt that, in order to be able to fulfil his function in a fair trial, a judge should be informed by the opinions of both parties, not solely the prosecution.

92 *Jasper v. The United Kingdom*, ECHR, [GC], no. 27052/95, 16 February 2000 and *Fitt v. The United Kingdom,* ECHR, [GC], no. 29777/96, 16 February 2000.

93 In *Fitt v. The United Kingdom,* the prosecution had notified two *ex parte* applications. In the second application the defence had been notified that the material related to sources of information and an *inter partes* hearing had followed but the defence had no knowledge of the full nature of the evidence in question.

94 *Jasper v. The United Kingdom*, ECHR, [GC], no. 27052/95, 16 February 2000, para. 56 and *Fitt v. The United Kingdom,* ECHR, [GC], no. 29777/96, 16 February 2000, para. 49.

95 Dissenting Opinions of Judges Palm, Fischbach, Vajić, Thomassen, TsatsaNikolovska and Traja, appended to the *Jasper v. the United Kingdom* and *Fitt v. The United Kingdom* judgments.

96 Ibid.

Another dissenting opinion appended to these judgments reached the same conclusion through different reasoning. Its point of departure was the well-established principle that "any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied."[97] The dissenting judge stressed how in the cases at stake, despite the government contending that there were insurmountable difficulties in this regard, there was a viable and less restrictive alternative measure able to protect both interests involved which ought to be preferred and was not. It referred to the appointment of a special counsel acting on behalf of the defence in the context of the *ex parte* application. This matter will be analysed below.[98]

6.1 The role of the judge in relation to disclosure

An interesting aspect of the conflict between the right to disclosure and the protection of the public interest is the position of the judge called to assess and decide over that conflict. The ECtHR tackled this issue in its case law. The Court first focused on the impartiality of the trial judge as a guarantee of the defence rights (or as a surrogate to the defence representation). It then went a step further analysing whether such impartiality is still an effective guarantee in situations where the judge, in the absence of the defence, is called to examine material (whose non-disclosure is sought by the prosecution) which he will have to discard when called to decide an issue of fact in that same criminal proceedings.

In the cases of *Jasper v. the United Kingdom* and *Fitt v The United Kingdom*, the Court, albeit by a narrow majority, stressed the importance of the role of the trial judge in the evaluation of the relevant material whose non-disclosure was pursued. The fact that the prosecutor had made his *ex parte* application to the trial judge was deemed a determining factor in the assessment of the fairness of the procedure. The ECtHR considered that the defence interests were safeguarded by the impartial role of the trial judge called to examine the nature and the relevance for the defence case of the evidence that the prosecutor intended to withhold.

However, doubts arise about what the court should or should not see. The full knowledge of the case by the trial judge and his impartiality were the essential elements that guided the ECtHR (in the cases of *Jasper* and *Fitt*) in considering him the appropriate organ for deciding on the prosecutor's application. It is the trial judge who is best placed to assess the competing interests involved and decide whether the material at stake should be disclosed in the name of fairness. The trial judge's impartiality must be preserved by all possible means. Rejecting non-disclosure applications implies the access to confidential material that could not be shown to the defence and may influence the opinion of the judge who is then called to decide an issue of fact or to deliver a verdict on the entire case where there is no jury. This was the concern of the minority of the judges in *Jasper* and *Fitt*. This

97 *Van Mechelen and Others v. The Netherlands*, ECHR, no. 21363/93, 23 April 1997.
98 Dissenting Opinion of Judge Hedigan, appended to the *Jasper v. the United Kingdom* and *Fitt v The United Kingdom* judgments.

position was illustrated in their dissenting opinion in which the judges stated that the trial judge should not be put in the "uncomfortable position of having to see material and then having to discount it at a later stage of the proceedings when he has to decide an issue of fact.[99]

Interestingly, in another dissenting opinion appended to the judgment in the case of *Jasper v. The United Kingdom*, Judge Hedigan, while assessing whether domestic authorities could have followed a less restrictive approach in the management of the conflict of interests, drew the attention to a procedure adopted in Northern Ireland. Such a procedure foresees that *ex parte* applications seeking non-disclosure on public interest grounds are made to any judge but the trial judge. This procedure avoids putting the trial judge "in the uncomfortable position of having to see material and then having to discount it at a later stage of the proceedings".[100] The reference made to an organ which is foreign to the proceedings where the prosecutor requests the non-disclosure, is interesting in the management of the conflict between disclosure and public interest.

In the case of *Edwards and Lewis v. The United Kingdom,* the ECtHR returned to this issue indicating that the trial judge should not be put in the uncomfortable and dangerous position of seeing material, whose non-disclosure is sought by one party, when such material can have an impact on an issue of fact that the same judge is required to decide upon. In the latter scenario, the impartiality of the trial judge would be jeopardised by the potential influence of the material showed to him. The defence in the absence of knowledge of the material concerned would have no opportunity to submit any argument to counterbalance such an influencing effect with evident consequences on the fairness of the proceedings.

Mr. Edwards had been arrested following a surveillance operation and in the company of an undercover police officer in a van in which a briefcase that contained heroin was found. He was convicted and sentenced to nine years imprisonment for possessing drugs with intent to supply. Before the commencement of the trial, the prosecutor informed the defence that an *ex parte* application had been made to withhold evidence on public interests grounds. The judge considered the material in the absence of the defence and concluded that there were genuine public interest grounds for non-disclosure. The trial judge who reconsidered the issue reached the same conclusion. The other applicant, Mr. Lewis, was arrested following an undercover operation when he supplied counterfeit notes to two undercover police officers. He was later convicted and sentenced to four years imprisonment. The defence had applied to the Crown Court seeking, *inter alia*, further disclosure by the prosecutor. Prior to the decision on this application the judge had received an *ex parte* application by which the prosecutor sought permission to withhold certain material evidence on public interests grounds. The judge refused to order the stay of the proceedings or to order further disclosure and stated that most of

99 Dissenting opinions of Judges Palm, Fischbach, Vajić, Thomassen, TsatsaNikolovska and Traja, appended to the *Jasper v. the United Kingdom* and *Fitt v The United Kingdom* judgments.
100 Ibid.

the information sought by the defence was subject to public interest immunity.

Both applicants claimed to be a victim of entrapment by undercover police officers. Although under English law entrapment does not provide a defence, the judge has discretion over whether to order a stay of the prosecution if it appears that the defendant would not have committed the offence were it not for the activity of an undercover police officer. Moreover, the court can exclude evidence obtained by an undercover police officer. The applicants claimed that the domestic proceedings had been unfair because the trial judge given the task of reviewing the material whose non-disclosure was sought by the prosecutor also had to decide on the question of whether the accused had been a victim of entrapment or not.

The ECtHR noted that in both cases the judges who had rejected the defence's submissions on entrapment had already seen the prosecution's evidence which might have been relevant to the issue. The ECtHR had no knowledge of the nature of such evidence. However, the UK Government in relation to Mr. Edwards had revealed that the evidence object of the *ex parte* application concerned the previous involvement of the accused in similar criminal conduct.[101] The defence did not have the opportunity to counter these allegations and the evidence showed to the trial judge might have influenced his decision on the entrapment's submission. The Court concluded that an *ex parte* procedure before the trial judge was not sufficient to secure a fair trial where the undisclosed material related, or may have related, to an issue of fact which formed part of the prosecution' case, which the trial judge, not the jury, had to determine and which might have been of decisive importance to the outcome of the applicants' trials.

The defining difference between the cases discussed lies in the position of the trial judge. In the cases of *Jasper v. The United Kingdom* and *Fitt v The United Kingdom* the judge who rejected the prosecutor's *ex parte* application seeking non-disclosure was not called to decide on a question of fact and the separation between the judge and the jury safeguarded the rights of the defence. In contrast, in the case of *Edwards and Lewis v. the United Kingdom* the judge called to determine whether non-disclosure was legitimate was also in charge of deciding on a question of fact, which potentially could bring the proceedings to a closure. The knowledge of material suggesting the previous involvement of the accused in analogous criminal offences might unconsciously affect his assessment of the alleged entrapment. Under these circumstances, the nature of the conflict between the defence's interest in disclosure and the public interest in non-disclosure if assessed by the trial judge violates the defence's right to a fair trial.

101 Although in *Edwards and Lewis* the situation concerned the specific situation of non-disclosure of information that had been admitted as evidence, in its recent case law the ECtHR has broadened the applicability of its findings on this issue. Specifically, it stated that "even if the information in question was not part of the prosecution file and had not been admitted as evidence, the court's duty to examine the incitement plea and ensure the overall fairness of the trial requires that all relevant information, particularly regarding the purported suspicions about the applicant's previous conduct, be put openly before the trial court or tested in an adversarial manner. See ECtHR, *Bannikova v. Russia*, 4 November 2010, para. 62.

The analysis of these judgments seems to suggest that the trial judge may be in charge of assessing the prosecutor's *ex parte* application for non-disclosure as long as he is not called, in the same case, to decide on an issue of fact. However, one may wonder whether this is sufficient to counterbalance the restrictions on the defence's rights and particularly the lack of participation in the proceedings. The question is whether the impartiality of the organ called upon to assess the application for non-disclosure can compensate for the lack of the defence's representation in such a procedure. The ECtHR seems to answer this question in the negative.

In the recent case of *A. and Others v The United Kingdom*[102] the ECtHR made reference to the judgment delivered in 2007 by the Canadian Supreme Court in the case of *Charkaoui v Minister of Citizenship and Immigration.*[103] The case, although not a criminal case, is noteworthy because it illustrates the way in which the Canadian Court assessed the role of the judge in relation to procedures dealing with the public interest and disclosure.[104] The ECtHR quoted paragraph 64 of the judgement (which is also reported in this paragraph below) in which the Canadian Supreme Court concluded that the trial judge cannot be considered as a surrogate for the defence's representation.

The Canadian Supreme Court was called upon to examine the provisions of the Immigration and Refugee Protection Act (IRPA), part of the immigration law of Canada. The provisions allow the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate stating that a non-citizen (permanent resident or foreign national) living in Canada, is not admissible to Canada, and therefore can be removed, on grounds of security such as, *inter alia*, connection to terrorist activities. The certificate leads to the detention of the person concerned. The reasonableness of the certificate and the detention are both subject to the review of a Federal Court judge. The review procedure contemplates a hearing but the person named in the certificate is denied the opportunity to participate in the proceedings and has no right to be disclosed the material upon which the certificate has been issued. The defence guarantees are placed entirely on the judge's shoulders. The judge must provide the person with a summary of the case against him in which no mention is made of the confidential material that might compromise national security. If the judge confirms the reasonableness of the certificate, the procedure envisages no further appeal. If the judge finds the certificate reasonable, it automatically becomes a removal order.

The Supreme Court, among other things, had to assess whether the procedure in which the reasonableness of the certificate was reviewed (by a judge of the Federal

102 *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009, para. 111. This case is analyzed in the chapter concerned with the judicial system of the United Kingdom and disclosure.

103 Supreme Court of Canada, *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada.

104 This case was not discussed by the ECtHR which quoted its paragraph 64 (which is also reported in this paragraph below) in which the Canadian Supreme Court concluded that the trial judge cannot be considered as a surrogate of defence representation.

Court of Canada) in the absence of the defense met the basic requirements of procedural justice having regard to the government's purpose and the rights of the person affected.[105] Central to this analysis was the role of the judge in the procedure in question.

The Supreme Court noted that the fairness of the IRPA procedure depended entirely on the designated judge. It is worth quoting the relevant paragraphs of the judgment in order to grasp the Supreme Court remarks on the role of the judge in the procedure in question:

> The fairness of the *IRPA* procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing.
>
> The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable.
>
> Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information. The judge is not helpless; he or she can note contradictions between documents, insist that there be at least some evidence on the critical points, and make limited inferences on the value and credibility of the information from its source. Nevertheless, the judge's activity on behalf of the named person is confined to what is presented by the ministers.
>
> The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?[106]

[105] The background against which to assess the issue was the Canadian Charter of Rights and Freedoms (Charter). The Supreme Court referred to section 7 of the Charter which, under the heading of "Legal Rights", states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 7 applies all people within Canada including non-citizens

[106] Supreme Court of Canada, *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, paras. 63-64.

The IRPA procedure attempts to meet the requirements of justice through the mechanism of the designated judge's review. However, the secrecy of the scheme denies the person concerned the knowledge of the case against him therefore undermining the judge's ability to reach a decision based on all relevant facts and law. Consequently, the IRPA procedure did not conform to the principles of fundamental justice. The role of an impartial judge cannot be expected to be an effective substitute for the defence informed participation. Even less so when his knowledge of the case is affected by non-disclosure. The Supreme Court concluded that the IRPA procedure violated the Charter. Consequently in October 2007 the government introduced Bill-C3 in the Senate. The Bill amended the IRPA procedure providing for the appointment of a special advocate to represent the person named in the certificate. During the filmed proceedings the special advocate is able to assess its reasonableness.

The ECtHR cases[107] and the case before the Supreme Court of Canada discussed in this paragraph differ, *inter alia*, in relation to one important aspect which concerns the nature of the cases at stake. On the one hand, the ECtHR dealt with cases where the tension between the defence's interest in disclosure and the public interest in confidentiality arose during the trial. On the other hand, the Canadian Supreme Court judgment dealt with an *ex post facto* assessment of a decision, which had already been reached through a procedure in which the defendant played no role. Furthermore, the designated judge entrusted to assess the need for disclosure of confidential material had no previous knowledge of the case and based his decision only on the material put to him by one side.

Moreover, in situations dealing with the alleged involvement in terrorist activity of the person concerned, the threshold of the protection of the due process rights, including the right to disclosure of information, can be lower than in other cases. However, it cannot be eroded to the point of becoming meaningless.

A second interesting aspect of the Canadian judgment examined concerns the illustration made therein of "less intrusive alternatives" which have been adopted, in a number of legal contexts, to reconcile the defence's right to disclosure with the public interest in the confidentiality of material or, borrowing the words of the court, "to protect sensitive information while treating individuals fairly".[108] The existence of such alternatives has also been acknowledged by the ECtHR in its case law and it will be examined in the following paragraph.

6.2 The ECtHR's indications for managing the conflicts of interest

The ECtHR, in its case law dealing with the conflict between the right to disclosure of information and the public interest, has limited itself to the analysis of the fairness of the decision-making procedure followed by domestic authorities in managing such a conflict. However, without explicitly recommending the adoption

107 *Jasper v. the United Kingdom, Fitt v The United Kingdom* and *Edwards and Lewis v. The United Kingdom.*
108 Supreme Court of Canada, *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, para. 70.

of specific solutions, it referred to alternative procedures employed by specific judicial systems as virtuous examples of the way to handle the above-mentioned conflict of interest.

In *Chahal v. the United Kingdom*, the Strasbourg Court acknowledged that the use of confidential material might be unavoidable when the national interest is at stake. However, it made clear that domestic courts should be able to exercise control over the government's decision to assert that national security and terrorism are involved.[109] The attention of the ECtHR was drawn, by several humanitarian organisations, to the procedure applied in Canada in situations where evidence cannot be disclosed on national security grounds.[110] The Canadian procedure was applied in cases before the Security Intelligence Review Committee ("SIRC"), which considered whether a Minister's decision to remove a foreign national, with the status of permanent residence, on national security grounds was well-founded. According to the Canadian procedure envisaged by the Canadian Immigration Act 1976 (amended by the Immigration Act 1988), a recorded hearing of all the evidence is held before a Federal Court judge, in which the suspect is provided with a summary, as detailed as possible, of the case against him. The suspect can be represented and can call evidence. The confidential material is examined in the absence of the suspect and his lawyer. However, at the examination of the confidential material a security cleared counsel instructed by the court takes the place of the suspect and his lawyer. He "cross-examines the witnesses and assists the court to test the strength of the State's case".[111] The defendant receives a summary of the evidence obtained by this procedure with the necessary redactions. Regarding the Canadian procedure, the ECtHR commented that "this example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice".[112]

Following the *Chahal* judgment, the UK introduced legislation, similar to that of Canada, making provisions for the appointment of a special counsel in cases involving national security. However, as is discussed in greater detail in the section concerning the judicial system of the UK, this procedure differed substantially from the Canadian one insofar as it did not allow any communication between the special counsel, who safeguards the right of the defendant, and the defendant himself once the *ex parte* hearing has begun. The ECtHR, in *A. and Others v The United Kingdom* recognised that the special counsel "could perform an important role in counterbalancing the lack of full disclosure".[113] However, it stressed that "the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against

109 The case is analysed in the chapter concerned with the judicial system of the United Kingdom and disclosure.
110 See *Chahal v. The United Kingdom*, ECHR, [GC], no. 22414/93, 15 November 1996, para. 144.
111 Ibid. at para. 144.
112 Ibid. at para. 131. See *ex multis Tinnelly & Sons Ltd and Others v. The United Kingdom*, ECHR, no. 20390/92, 10 July 1998 and *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009.
113 *A. and Others v. The United Kingdom*, ECHR, [GC], no. 3455/05, 19 February 2009 para. 220.

him to enable him to give effective instructions to the special advocate".[114]

By referring to these examples, the ECtHR acknowledged the existence of different solutions to reconcile the defence's rights, in particular the right of disclosure, with the legitimate concerns about confidentiality. None of the above examples is *per se* the solution to all the problems that the unavoidable friction between the oppossing interests creates. However, they show that there is room to accommodate the essential concerns of the two interests at stake and it must be exploited with flexibility and creativity.

The above mentioned case of *Charkaoui v Minister of Citizenship and Immigration* in the Supreme Court of Canada illustrated several alternative and creative methods that reconcile opposing interests such as due process rights and the public interest. The Canadian legal system "has gone further than any other legal system in devising novel procedures to accommodate these difficulties".[115] We have seen that the ECtHR discussed the above described SIRC procedure in the *Chahal* judgment which was followed with the creation of the special counsel in the English legal system.

Furthermore, the Supreme Court referred to the so-called *Air India* trial where the Crown was in possession of the results of the investigation (which had lasted seventeen years) over a terrorist bombing of a civil aircraft which occurred in Japan.[116] The main exigency in that context was managing security and intelligence information in a way that did not erode the defence's rights to an extent that compromised the procedural fairness of the trial. The solution reached saw the prosecutor and the defence counsel negotiate an agreement in relation to the sensitive information. Specifically, the defence counsel, with the express consent of his client, signed an undertaking by which he would not be allowed to disclose to anyone, including the defendant, the material the prosecutor would allow him to review. This is an interesting solution, although it is difficult to apply it to procedures where a large number of defendants and lawyers are involved. Nonetheless, as noted by the Supreme Court, it suggests "that a search should be made for a less intrusive solution".[117] Furthermore, all these examples show that despite the extremely delicate ground on which the opposing interests lie, there is room for alternative and creative solutions aimed at accommodating them in a mutually satisfactory way.

At the conclusion of this analysis, it seems possible to summarise the main findings of the ECtHR in assessing the different solutions designed to handle the conflict between the public interest (in national security for example) and the procedural rights of the defendant envisaged by article 6 of the Convention. An attempt is made here to summarise these different findings:

114 Ibid.
115 Leigh I., *Secret Proceedings in Canada*, Oosgode Hall Law Journal, Vol. 34, No. 1, 1996, p. 114.
116 Supreme Court of British Columbia, R. v. Malik and Bagri, 2005 BCSC 350.
117 Supreme Court of Canada, *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, para. 78. The comment was made in relation to the IRPA procedure that was object of the examination of the Court.

- A procedure whereby the police or the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements of article 6(1) (*Natunen v. Finland*);

- The individual decision of the prosecutor to withhold information, weighing it against the defence's right to disclosure violates the defence due process rights (*Rowe and Davis v. The United Kingdom*);

- *Ex parte* applications for non-disclosure made by the prosecutor to the trial judge who is fully versed in all the evidence and issues in the case and in a position to monitor the relevance of the withheld information to the defence in principle do not infringe upon the right to a fair trial. (*Jasper v. the United Kingdom* and *Fitt v. the United Kingdom*);

- *Ex parte* applications to the trial judge for non-disclosure of material that is related, or may be related, to an issue of fact which the trial judge, not the jury, has to determine and which might be of decisive importance to the outcome of the applicants' trials violates the right to a fair trial (*Edwards and Lewis v. The United Kingdom*);

- In proceedings where non-disclosure is invoked on national security grounds, the judicial review without any adversarial involvement of the defence in the procedure is not sufficient to comply with the defence guarantees envisaged by the Convention (*Chahal v. The United Kingdom*);

- The judge is "not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet" (*Charkaoui v Minister of Citizenship and Immigration* quoted by the ECtHR in *A. and Others v. the United Kingdom*);

- The use of a special advocate to safeguard the interests of the accused in a recorded hearing can counterbalance procedural unfairness caused by lack of full disclosure in national security cases. It is therefore a more effective form of judicial control (*Chahal v. The United Kingdom*);

- In order for the special advocate to perform his function effectively the defendant must be provided with "sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" (*A. and Others v. the United Kingdom*).

7. The appeal proceedings as a possible remedy

The ECtHR case law suggests that a defect occuring during the first instance trial rendering the proceedings unfair, can be remedied on appeal. The *Condicio sine qua non* for it to happen is that the appeal judicial organ enjoys full jurisdiction. In

other words, the reviewing court must guarantee a review of the case from both a procedural and a substantive law perspective and it must have the power to quash the appealed decision either substituting it with its own or returning the case for a new decision.

In *Dallos v. Hungary* the applicant complained that in appeal the charges against him had been reclassified. The appeal body had convicted him of aggravated fraud whereas at trial he had been found guilty of embezzlement according to the indictment. The Commission held that had the applicant had the opportunity to make submissions to the appeal court in relation to the charge of fraud his defence would certainly have been different from the one adopted to face the initial charge of embezzlement. Unlike the Commission, the ECtHR attached great value to the Supreme Court's full review of the case and to the hearing in public session in which the applicant's defence had had the opportunity to be heard in relation to the new charge. These factors, in the eyes of the Court, could have led to the acquittal of the defendant by the Supreme Court. Consequently, it was satisfied that the Supreme Court's proceedings had cured any defects (violation of article 6(3)) detected in the previous stage.[118]

The possibility of remedying an unfairness affecting the first instance proceedings at a later stage is also applicable to cases where the lack of disclosure at first instance harmed the fairness of the proceedings. Two cases against Finland provide a good example of the way in which the ECtHR applies the above-mentioned principle to the issue of disclosure.

In *M.S. v. Finland*, the applicant had been convicted of aggravated sexual assault on his stepdaughter.[119] Part of the applicant's defence at trial was that he had never been alone with the victim in the place where the offence had allegedly occurred. The applicant's wife gave evidence to the contrary. M.S. was sentenced to eleven months imprisonment and lodged an appeal attaching to it a statement from his wife in which she retracted her previous version supporting this time the applicant's version. A month later the Appeal Court received a letter from the then ex-wife of M.S. in which she, again, changed her position stating that she had been pressured to sign the letter attached to the appeal. The letter was not disclosed to either party. The applicant learned about it through the Court of Appeal's judgment, which upheld his conviction and considered it "manifestly unnecessary to request [the applicant's] comments on the statements". The Supreme Court denied M.S.' application seeking leave to appeal. Before the ECtHR, the applicant complained that the Court of Appeal had simply decided to uphold one version of the testimony of his wife who was clearly an unreliable witness whereas such testimony should have been disregarded entirely. The Strasbourg Court acknowledged the relevance of the letter received by the Appeal Court insofar as it affected the credibility of an important witness. It went on stating that only the parties could have properly

118 *Dallos v. Hungary*, ECHR, no. 29082/95, 1 March 2001.
119 *M.S. v. Finland*, ECHR, no. 46601/99, 22 March 2005.

decided on whether or not to comment on that letter. The ECtHR then assessed whether the Supreme Court's proceedings constituted a proper remedy for the non-disclosure. It answered the question in the negative because such proceedings were limited in their scope to whether or not the leave to appeal should be accorded and did not concern a full review, in law and on the merits, of the applicant's case.

In *V. v. Finland*, the applicant had been convicted on drug related charges.[120] He had claimed entrapment as part of his defence. An individual (referred to as H), who was held in custody and had been promised by the police that they would drop the charges if he "set up a bigger player", had contacted the applicant several times (from police custody) asking for a kilogram of cannabis and agreeing to meet him for the purchase. The applicant did not have the cannabis with him but said he could get it from a third person. The police tried to conceal from the court, the defendant and the prosecutor that H was held in custody when calling the applicant. Subsequently, they also refused to disclose to the applicant the telephone recording information that could have shed light on the moment (before or after the police involvement) at which the crime was committed. The applicant appealed this non-disclosure decision before the County Administrative Board, which ordered the police to disclose the telephone metering. However, the decision was delivered only after the expiration of the deadline for filing the appeal against the first instance judgment. Furthermore, the disclosure that followed the County Administrative Board's decision was only partial and the full telephone recording was never disclosed. The Court noted that the non-disclosed material was related to an essential issue of fact in the case that was relevant to the claim of entrapment. It also found that the appeal proceedings were not adequate to remedy the lack of disclosure since the applicant could not make informed submissions as the disclosure occurred only after the deadline for the filing of the appeal.

These cases, although the Court concluded that the unfairness found during the proceedings was not remedied at a further stage, do not contradict the findings in *Dallos*. On the contrary, they corroborate the idea that a violation of Article 6 occurred at the first instance trial can be remedied through an appeal procedure which provides a review of the case. The central element is the procedure that should cure the defect that, as mentioned, must consist of a full review in law and on the merits of the case. Furthermore, when the unfairness detected concerns undisclosed material the "second proceedings" must assess whether the procedure followed to opt for non-disclosure was compliant with article 6 of the Convention. In the case of *M.S. v. Finland*, if the proceedings before the Supreme Court had not been limited in their scope so as to only provide leave to appeal, most likely no violation of article 6 would have been found. In *V. v. Finland* the Court found that the appeal proceedings could not have remedied the unfairness of the trial proceedings as it was still impossible for the defendant to make informed submissions to support his case on entrapment. In this case, a different body (County Administrative Board) had determined that non-disclosure of certain material evidence had affected the

120 *V. v. Finland*, ECHR, no. 40412/98, 24 April 2007.

defence due to its relevance for the claim to be a victim of entrapment. This finding had unfortunately occurred after the time limit for the appeal had elapsed. The conclusion can be drawn that in cases where non-disclosure has been found to be unfair, a further degree of jurisdiction cannot cure the defect unless the full review takes place in light of the disclosed material.

This principle was recently reaffirmed by the Strasbourg Court in the case of *McKeown v. The United Kingdom*, in which it stated that "where the trial judge is not able to rule on the disclosure issue, the lack of fairness at first instance can be remedied on appeal only where the Court of Appeal orders full, or virtually full, disclosure to the defence".[121]

In contrast, when the trial judge was not able to rule on the issue of disclosure and the Appeal Court did not order full disclosure to the defence the ECtHR did not accept that the Appeal Court's *ex parte* assessment of the material not disclosed at trial could be an effective remedy.

For instance, in *Atlan v. The United Kingdom* the prosecution had repeatedly denied during the first-instance trial that they had any evidence in their possession concerning the man whom the applicants accused of having been an informer and had falsely implicated them. Shortly before the hearing of the appeal, the prosecution informed the defence that, in contrast to their earlier statements, there was some undisclosed material. The Court of Appeal, following an *ex parte* hearing, ruled that this evidence could remain undisclosed on grounds of public interest immunity. The Strasbourg Court found a violation of Article 6 of the Convention on the grounds that, (as in *Rowe and Davis*) the trial judge had been better placed than the appeal court judges to decide whether or not the non-disclosure of material evidence would be prejudicial to the defence and might, moreover, have chosen a different form of words in his summing up before the jury had he seen the evidence in question.[122]

The approach followed by the Court in relation to the appeal proceedings as a possible redress of disclosure violations is exposed to a criticism in relation to the rule of law[123] In judicial systems that foresee two stages of full and fair jurisdiction over a case, such as Italy to mention one, the application of the approach of the ECtHR legitimises the loss of the opportunity to have a fair first instance trial. When a violation of Article 6 has been ascertained in relation to the trial proceedings the fact that such defect might be remedied upon appeal does not *per se* cure the loss of one of the two instances the accused was entitled to. In *Twalib v. Greece* Judge van Dijk appended a dissenting opinion in which he held that if shortcomings in the fairness of the first instance proceedings are ascertained, they cannot be remedied simply by the fact that the appeal proceedings are fair. This would equate, in fact,

121 *McKeown V. The United Kingdom*, ECHR, no. 6684/05, 11 January 2011, para. 46.
122 *Atlan v. The United Kingdom*, ECHR, no. 36533/97, 19 June 2001.
123 See Trechsel, above n. 7 at p. 235.

to considering the issue of fairness in the first instance proceedings completely irrelevant. He went on affirming that the shortcomings "would only be remedied if the appeal court, in view of the shortcomings in fairness, quashed the first-instance decision and ordered a retrial".[124]

124 *Twalib. v. Greece*, ECHR, no. 24294/94, 9 June 1998, dissenting Opinion of Judge van Dijk. However, in the last paragraph of his dissenting opinion, Judge van Dijk seems to suggest that the possibility to remedy the unfairness of the first instance trial simply by a fair appeal can be applicable to minor offences.

VI. Disclosure of information in the legal system of the International Criminal Tribunal for the former Yugoslavia

Introduction

> Evidentiary disclosure is the life-blood of the fact-finding process. Given the inevitable mismatch of resources between the prosecution and the accused, disclosure is the tool by which the defence achieves equality of arms in the adversarial trial process and, thereby, a fair trial.[1]

> "The underlying differences between the common law adversarial system and the civil law inquisitorial system are nowhere better reflected than in the differing approach taken to disclosure". [2]

This chapter analyses the rules of procedure of the International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY or Tribunal) regulating the obligations of disclosure upon the Prosecutor (hereafter Prosecution, Prosecutor or OTP) and the defence. Disclosure obligations must be considered against the background of the procedural system in which they operate. Therefore, an assessment of the main features of the criminal procedure of the Tribunal, their origins and developments since the adoption of the Rules of Procedure and Evidence (hereafter RPE or Rules) in 1994 will be carried out. It will be seen how the initial approach to the criminal procedure was based on an adversarial model. However, this system soon proved to be unfit to enable the Tribunal to honour its main commitment to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia through expeditious trials. The adoption of new rules of procedure and evidence and several amendments to the existing rules have marked, since 1998, a departure from the original adversarial orientation of the RPE. The new procedural system is characterised by a more active judicial control over the proceedings, described as judicial management of the cases.

The second part of the chapter considers in more detail the rules governing disclosure of information and their interpretation and application by the Tribunal's jurisprudence. Disclosure is an essential element of the right to a fair trial enshrined in Article 20 of the ICTY Statute which encompasses the principle of the equality of arms. The defendant's right to have adequate time and facilities for the preparation of his defence is regulated by Article 21 of the ICTY Statute and includes the right of the accused to the disclosure of evidence. The analysis will cover the rules regulating disclosure by the Prosecution and the defence, the exceptions to the obligation to disclose, the tension between competing interests such as the right of the defendant to a fair trial and the need to protect witnesses

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1 Morrissey P., *Applied Rights in International Criminal Law: Defence Counsel and the Right to Disclosure*, in Boas G., Schabas W.A. and Scharf M.A., *International Criminal Justice Legitimacy and Coherence*, Edward Elgar Publishing Limited, 2012, p. 84.

2 Gibson K. and Lussiaà-Berdou C., *Disclosure of Evidence*, in Kahn K.A.A., Buisman C., Gosnell C., *Principles of Evidence in International Criminal Justice*, Oxford University Press 2010, p. 310.

and victims as well as the need to accommodate national security concerns. Finally, the possible remedies and sanctions available to respond to violations of rules of disclosure will be assessed.

In the final part of the chapter the main problematic aspects of the ICTY disclosure regime emerging from the analysis will be discussed, assessing whether the obligations to disclose information and the way in which they are discharged in the practice of the ICTY are in line with the defendant's fundamental right to a fair trial.

1. The ICTY judicial system

On 22 February 1993, the United Nation Security Council passed Resolution 808, which authorised the establishment of the International Criminal Tribunal for the Former Yugoslavia. The resolution requested the Secretary General to submit, at the latest within 60 days, a report on all aspects of this matter including specific proposals, taking into account suggestions put forward by member states.[3] In other words, the Secretary General was requested to draft the Statute of the International Tribunal. On 25 May 1993, the Security Council unanimously approved Resolution 827, which established the Tribunal and approved, without any change, the draft of the Statute proposed by the Secretary General. [4]

Article 15 of the Statute of the ICTY, headed Rules of Procedure and Evidence, states as follows:

> The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

The first judges of the Tribunal were elected on 15 September 1993 and the Prosecution took office almost a year later on 24 May 1994. The first draft of the Rules was approved on 11 February 1994.[5] One of the reasons why the judges were delegated the important function of drafting the RPE was the highly technical nature of the rules of criminal procedure and evidence that differ in each legal system as well as the expertise and practical experience offered by the judges with respect to such rules.[6] This is an important factor to bear in mind when studying the nature and characterisation of the Tribunal's judicial system. Specifically, when drafting the Rules, the judges brought their own experience from their domestic judicial system, inevitably influencing the wording and orientation of the RPE and even more their subsequent interpretation through the jurisprudence of the

3 Security Council Resolution 808, 22 February 1993, 48th session, 3175th meeting, U.N. Doc. S/RES/808.
4 Security Council Resolution 827, 25 May 1993, 48th session, 3217th meeting, U.N. Doc. S/RES/827.
5 The Judges commenced their work at the first session held in November 1993 and completed it at the second session held from 17 January to 11 February 1994. For a description of the work carried out by the judges see Morris V. and Sharf M.P., *An insider's guide to the International Criminal Tribunal for the Former Yugoslavia: a documentary history and analysis*, Transnational Publisher, Inc. 1995, p. 180.
6 Morris and Sharf, above n. 5 at p.176.

Tribunal. The judges of the ICTY had the difficult task of finding a synthesis between more adversarial and more inquisitorial models in order to allow the Tribunal to run fair and expeditious trials. The system that was created was significantly more adversarial in its nature reflecting the common law tradition. Judge Antonio Cassese, first President of the ICTY, stated in public that a largely adversarial approach to the ICTY procedure had been taken, rather than the inquisitorial approach found in continental Europe and elsewhere.[7]

In choosing an adversarial model over an inquisitorial one, the influence of the US played an important role. The United States more than other countries, contributed with concrete proposals to the making of the RPE. These proposals were detailed and exhaustive and provided explanations for the decisions made therein. Judge Gabrielle Kirk McDonald, future President of the ICTY, brought with her a complete set of proposed rules prepared by a special committee of the American Bar Association.[8] Many of these proposals have found their way to the RPE of the ICTY.[9] Moreover, the UN Secretary General was assisted by the United Nations Office of Legal Affairs in the drafting the Statute of the Tribunal whose team members came from the U.S., the UK, Liberia, Israel and Germany, the latter being the only civil law country. Furthermore, the judges who drafted the complex set of rules of procedure and evidence came mostly from common law jurisdictions.[10] Therefore, the preference accorded to a mainly adversarial criminal procedure came as no surprise. However it must be said that certain provisions of a civil law origin found their place in the first drafting of the RPE .[11]

The Rules of Procedure and Evidence were aimed at guiding the Tribunal to conduct very complex, and large scale criminal trials in an expeditious manner guaranteeing, simultaneously, their fairness and their adherence to the internationally recognised standards of human rights. Therefore, it is understandable that the RPE of the ICTY have been characterised by a substantial degree of flexibility, which is reflected in the numerous amendments since their first draft in February 1994, "with a frequency unknown to any other jurisdiction before it".[12] Such flexibility became useful as it allowed the Tribunal to adapt the Rules to the practice emerging in the first years of the Tribunal's existence. Judge Richard May[13] of the ICTY stated that the amendments to the RPE, drafted by the judges, reflected the experience gained by the Tribunal.[14]

7 See First Annual Report of the ICTY, 17 August 1994, UN doc. A/49/342, para. 71.
8 Bassiouni M.C., *The law of the International criminal Tribunal for the Former Yugoslavia*, Transnational Publisher, Inc. 1996, p. 863.
9 Morris and Sharf, above n. 5 at p. 177.
10 See Bassiouni, above n. 8 at p. 863.
11 See First Annual Report of the ICTY, 17 August 1994, UN doc. A/49/342, paras. 72-74 in which the President of the ICTY mentions three major departures of the established legal system from the adversarial model. Judge Cassese referred specifically to: 1) the lack of technical rules for the admissibility of evidence, 2) the Tribunal may order the production of additional or new evidence *proprio motu*, 3) the granting of immunity and the practice of plea-bargaining found no place in the rules. The plea bargaining practice was subsequently imported in the RPE.
12 Boas G., *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, Criminal Law forum, 12 (2001) 41-90, p. 42.
13 Judge Richard May (1938-2004), served as the presiding judge in the proceedings against Slobodan Milošević.
14 May R. & Wierda M., *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Columbia J. of Transnational Law 727 (1999), p. 745.

Scholars and professionals have offered different characterisations of the legal system of the ICTY.[15] All these different characterisations appear to agree that a significant departure from the mainly adversarial system initially operating at the Tribunal occurred and that this departure begun in 1998.[16] It is also uncontested that the rationale behind this shift was to be found in the need to speed up the proceedings and that a more active and informed bench running the cases was singled out as the route to follow.

2. The ICTY initial procedure

In the original legal system of the ICTY, the Prosecutor initiates investigations *ex officio* or based on information received from any source.[17] In deciding whether or not to prosecute a suspect he enjoys significant discretion granted to him by the Statute.[18] At the end of the investigations, if the Prosecutor deems that a *prima facie* case exists against the suspect he drafts an indictment containing the facts and the charges.[19] The (reviewing) judge of the Trial Chamber who receives the proposed indictment from the Prosecutor, in accordance with article 19 of the Statute, confirms the indictment if he is satisfied that a *prima facie* case exists. Otherwise he dismisses it.[20] Rule 47 enshrines the possibility for the reviewing judge to ask the Prosecutor to present additional evidence on one or all counts.

When an indictment is confirmed a suspect assumes the *status* of accused and he will stand trial before the Tribunal. The reviewing judge in the original draft of Rule 15 (C) cannot be part of the bench that will try the case. The rule was amended so as to allow the reviewing judge to sit on the bench for trial, lifting the disqualification of the judge in these circumstances.[21] The judge who reviewed the indictment can also be a member of the Appeals Chamber that deals with the case as long as he was not a member of the Trial Chamber whose judgment is under scrutiny.

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15 Three are the main characterisations emerged in relation to the legal system of the Tribunal and its evolution. The first approach suggests that the system of the ICTY can be defined as *sui generis*. Thus, a system that is neither adversarial nor inquisitorial in nature, nor a combination of the two, but rather a unique system. A contextual approach to the system of the ICTY is necessary to understand its essence. Therefore, also when borrowing from domestic jurisdictions, the result must be tested against the unique nature of the Tribunal and its mission. On this point, see Robinson P.L., *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 European Journal of International Law 569, 588-89 (2000). See also, *Prosecutor v. Delalić*, IT-04-75, Decision on the Motion on Presentation of Evidence by the Accused, 1 May 1997, para. 15. The second approach submits that the system originated by the amendments of the rules occurred in the past ten years is a "mixed" or "hybrid" system, characterised by a gradual adoption of inquisitorial elements within the Rules and practice of the Tribunal. On this point see, *inter alia*, Cassese A., *International Criminal Law*, Oxford University Press, 2003, pp. 384-387. Finally, the third approach considers the ICTY procedure to have developed toward a managerial judging model characteristic of US civil proceedings. This interpretation contends that the changes, which modified the procedure of the Tribunal, have created a new model in which the goal of processing cases expeditiously is particularly important. This system embraces procedure as a tool to process cases swiftly with the collaboration and coordination of the parties. The parties not only compete as in the adversarial system but they do so in a much more coordinated fashion so to serve the main purpose of running a swift proceeding. For a detailed analysis of the managerial judging system, see Langer M., *The Rise of Managerial Judging in International Criminal Law*, American Journal of Comparative Law, Vol. 53, n.4 (2005), pp. 835-909.

16 For a detailed analysis of the nature of the legal system of the ICTY and for a comprehensive understanding of the different theories on this point see, *inter alia*, Ambos K., *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 International Criminal Law Review, 1 (2003); Cassese, above n. 15; May & Wierda, above n. 14 at p. 745; Tochilovsky V., *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals*, 46 Netherlands International Law Review, 343, 359 (1999); Zappala' S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 22 (2003). Robinson, above n. 15 at 588-89; Jackson J., *Finding the Best Epistemic Fit for International Criminal Tribunals*, Journal of International Criminal Justice, 7 (2009) 17-39; Böas, above n. 12 at pp. 41-90.

17 Article 18 of the Statute.

18 Article 16 of the Statute.

19 Article 18 of the Statute.

20 Article 19 of the Statute and Rule 47 (D).

21 See Rule 15 (C).

The commencement of the trial proceedings can be identified with the initial appearance of the accused before the designated Trial Chamber.[22] The accused is requested to enter a plea of guilty or not guilty. If he refuses to do so the Chamber will enter a not guilty plea on behalf of the accused.[23] The parties may then file the preliminary motions they deem necessary to obtain a ruling or a relief by the Trial Chamber. Rule 72 recognises this right of the parties. Hearings are public although under certain circumstances the right of the accused to a public trial may be curtailed to protect different interests such as "public order or morality, safety, security or non-disclosure of the identity of a victim or witness or the protection of the interests of justice".[24] The reason for holding a closed session must be made public.

The case presentation is regulated by the Rules. The Trial begins with the opening statements of the parties; first the Prosecution and then the defence. The latter may decide to hold back its opening statement until the beginning of the defence's case. Following the statements, the Prosecutor, who bears the *onus probandi*, will be the first to start his case followed by the defence. Evidence such as testimonials, documentary or physical, are adduced before the Trial Chamber. Evidence is presented according to a defined practice, regulated by Rule 85, which provides for the presentation of the evidence for the prosecution, evidence for the defence, prosecution evidence in rebuttal, defence evidence in rejoinder and finally evidence ordered by the Chamber pursuant to Rule 98. Each witness can be subject to the examination in chief, the cross-examination by the opposite side and the re-examination by the party who called him.[25] The Bench can ask questions to the witnesses.[26] Finally, the proceedings turn to an end with the closing statements of the parties as disciplined by Rule 86.

The deliberation of the judges on the guilt or innocence of the accused takes place by a majority vote; therefore the votes of two judges will determine the verdict.[27]The standard of proof that the Prosecutor has to meet on all charges is proof beyond reasonable doubt. Reasoned opinion in writing must accompany the judgment.[28]If an accused is found guilty, the Rules provide for a pre-sentencing procedure which allows the parties to file sentencing recommendations to the Chamber before the sentencing hearing which is a separate moment from the judgment.[29] In determining the sentence, the Trial Chamber is required to evaluate elements such as "the gravity of the offence and the individual circumstances of the convicted person" in accordance to article 24 of the Statute.[30]

22 The initial framework of the RPE did not contemplate status conferences or the existence of Pre-trial Chambers Rules 65 *bis* and *ter* were adopted on 25 July 1997 and 10 July 1998 respectively.
23 Rule 62. This Rule has been amended and a period of thirty days after the initial appearance had been awarded to the accused in order to enter the plea.
24 Rule 79.
25 Rule 85 (B).
26 Rule 85 (B).
27 Article 23 of the Statute and Rules 29 and 87.
28 Article 23 of the Statute.
29 Rules 100-101 as adopted on 11 February 1994.
30 Rule 101 integrates the nonexhaustive list provided by article 24 of the Statute.

3. The need for a reform of the system

Article 20(1) of the Statute provides, *inter alia*, that the Trial Chamber must guarantee that the trial is fair and expeditious. The right of the accused to be tried fairly and without undue delay is a recognised human right guaranteed by the main human rights instruments.[31] The legal system created by the Statute and the Rules in their original formulation was based on the conception of the judges as impartial arbiters with limited powers of intervention in a dispute between the parties. In addition, the Court had no previous knowledge of the case and became acquainted with it only when the presentation of the prosecution case commenced.

Soon it became evident that the Tribunal was encountering considerable problems in reconciling the goal of fair and expeditious trials with this the adversarial inspired procedure in place. The excessive length of the proceedings was perceived as an obstacle to the smooth functioning of the Tribunal. The judges, in accordance with the adversarial model, had scarce power of influencing the course of events in the proceedings, the chambers were unaware of the facts of the case pending before them prior to its commencement and the evidence at trial was mainly oral.[32] These elements of the system also affected the few provisions granting the judges some inquisitorial power. For instance, the possibility for the judges to question a witness (envisaged by Rule 85 of the RPE) was rather theoretical because the bench had no previous knowledge of the case. This compromises the concrete opportunity to intervene in the examination of a witness asking meaningful questions that would require a rather detailed knowledge of the case. As Langer points out, borrowing a famous quote[33], the inquisitorial powers given to the judges by the law in the books were, "in the law in action tilted even more toward a conception of judges as umpires."[34]

By July 1998, only two trials had been completed. The caseload of the ICTY had grown quickly. Judge Antonio Cassese stated that "it became clear fairly soon that, to expedite proceedings which, being grounded on the adversarial model, were rather lengthy, it was necessary to depart from the system whereby the court acts as a referee and has no knowledge of the case before commencement of trial, and even during trial only becomes cognizant of the evidence offered by the parties".[35] Judge Iain Bonomy concurred stating that "it is a simple fact of life that adversarial proceedings can tend to lack focus and can lead to lengthy, unproductive and largely irrelevant exchanges between examiner and witness... In the absence of judicial control....it is plain that the conduct of war crimes trials

31 Article 6(1) of the European Convention conceives the right of an accused to "a fair and public hearing within a reasonable time"; article 14(3)(c) states that the accused should be tried without undue delay; the American Convention proclaims, in article 8(1) the right of the accused to a hearing within a "reasonable time" and the African Convention through article 7(1)(d) states that the African Charter grants the right to be "tried within a reasonable time".

32 See Cassese, above n. 15 at p. 385 and Langer, above n. 15.

33 Roscoe Pound's famous distinction between the law in the books and the law in action.

34 See Langer, above n. 15 at p. 859.

35 Cassese, above n. 15 at p. 385.

in classical adversarial form results, and inevitably will result, in the proceedings in some cases lasting for several years".[36]

The excessive length of the proceedings and the poor statistics of the Tribunal were also elements of concern for the international community. In 1998, the General Assembly of the United Nations requested the Secretary General to conduct a review of the functioning of the ICTY. The Secretary General appointed an expert group that in 1999 delivered its Expert's Group Report[37] (hereafter Report) which, *inter alia*, confirmed that the judges believed that the prolonged nature of the proceedings was caused to a significant extent by the very limited control they could exercise on them. The report also acknowledged that the strict allocation of responsibilities for each party by the mainly adversarial system had prevented the judges from intervening in the presentation of evidence by the parties. "The judges may be needlessly sensitive to the potential for criticism if they intervene actively to exercise greater control over the proceedings".[38] Finally, the Report stated that the Tribunal's criminal procedure although based on an adversarial model was able to adopt elements from a civil law model and in some respect seemed to be already doing so.[39]

4. The advent of the judicial management of the cases

The RPE of the Tribunal have been amended 49 times between May 1994 and May 2013. Despite this quite considerable number, a turning point can be detected in 1998, when important rules were adopted and others were amended.
In December 1997, the President of the ICTY established the so-called Rules Committee and requested the Vice President to investigate possible solutions to speed up trials without harming the rights of the accused. Subsequently two trial management workshops were organised. Many jurists attended them, from both civil law and common law systems, discussing the conduct and speed of complex criminal trials. The Rules Committee recommended, *inter alia*, amendments to the RPE aimed at guaranteeing a more robust regulation of the pre-trial proceedings, including the establishment of a pre-trial judge.[40]
Consequently, in July 1997, Rule 65 *bis* (status conference) was adopted providing the possibility of a so-called status conference whose aim was "to organize exchanges between the parties so as to ensure expeditious preparation for trial". This rule has been subsequently amended and now it is a routine procedure in each case to hold status conferences on a regular basis in order to deal with issues arising between

36 Langer, above n. 15 at p. 349.
37 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc A/54/634 of 22 November 1999. This Report was completed when certain rules, which gave an important impulse toward a more effective judicial control of the proceedings, such as rules 65 *bis*, 73 *bis* and *ter* , rule 90 (G) had been already adopted or amended. It is nonetheless interesting as some 12 judges of the ICTY were interviewed along with 17 staff members of the Office of the Prosecutor, nine members of the Registry and two members of the Defence Counsel Unit, giving a first-hand testimony of the opinions of the professionals working at the Tribunal on its functioning.
38 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 of 22 November 1999, para 75
39 Ibid. at para. 82.
40 Fifth Annual Report of the ICTY, 10 August 1998, UN doc. A/53/219; para. 106.

the initial appearance of the accused and the commencement of the trial.
On a plenary meeting held on 11-13 March 1998, the judges adopted some of the recommendations of the Rules Committee. Rules 65 *ter* (pre-trial judge), 73 *bis* (pre-trial conference) and 73 *ter* (pre-defence conference), and 98 *bis* (motion for judgment of acquittal) were adopted. Rules 86 (closing arguments), 90 (testimony of witnesses) and 94 (judicial notice) were amended. On the eighteenth plenary session held on 9 and 19 July 1998 the judges adopted new Rules 65 *ter*, 73 *bis*, 73 *ter*, 74 *bis*, 94 *bis* (testimony of expert witnesses) and 98 *ter* (judgment).

Rule 65 *ter* (B) confers a relatively broad ability to manoeuvre to the pre-trial judge as it empowers him to adopt any measure necessary to prepare the case for a fair and expeditious trial. Interestingly Rule 65 *ter* (D)(ii) provides for the redaction of a work plan containing, albeit in general terms, the obligations the parties are required to meet in the pre-trial stage and the corresponding deadlines. The Prosecutor is expected to file the pre-trial brief with the Chamber giving full account of the evidence that he intends to present in relation to each count of the indictment and highlighting the form of responsibility the prosecutor will rely on for each alleged crime.[41] The defence will also file a pre-trial brief addressing the factual and legal issues and indicating the nature of the accused's defence.[42] In addition, the Prosecutor has to file the list of witnesses and the number of witnesses that will testify in relation to each accused on each count and an indication of whether the witnesses will testify *viva voce* or by a written statement.[43] The Prosecutor is requested to submit the estimated time he will need to question each witness and the estimated total amount of time he deems necessary for the presentation of his case[44] as well as to file a list of the exhibits he intends to tender during trial. The defence has the same obligations to fulfil. What differs is the timing, as the defence will have to file the above documents between the close of the Prosecutor's case and the commencement of his case. Finally, after the parties have complied with their obligations the pre-trial judge shall submit to the Trial Chamber "a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule".[45] This file, which is reminiscent of the inquisitorial dossier, allows the Trial Chamber to have knowledge of the case before its commencement, assisting the judges in playing a more incisive role in the conduct of the trial.
An example of the application of this rule can be found in the *Milutinović et al.* case.[46] Here the presiding judge issued an order establishing a work-plan for the parties, containing all the obligations they were required to meet and the corresponding dates by which these obligations had to be met. The work-plan was issued in order

41 Rule 65 *ter* (E)(i).
42 Rule 65 *ter* (F).
43 Rule 65 *ter* (E)(ii).
44 Rule 65 *ter* (E)(ii).
45 Rule 65 *ter* (L)(i) e (ii)
46 *Prosecutor v. Milutinović et al.*, IT-05-87, Pre-Trial Order and Appended Work Plan, 5 April 2006. The trial commenced on 10 July 2006. The Defence case commenced on 6 August 2007. The judgement was delivered on 26 February 2009. See also *Prosecutor v. Goran Hadžić*, IT-04-75, Order on Pre-Trial Work Plan, 16 December 2011.

to bring the case "swiftly and fairly" to trial.[47] The work plan appended to the order is reproduced below:

5 April 2006:	With a view to eventually filing a joint submission, which shall indicate the matters of fact and law on which the parties agree, as well as the matters on which they disagree and why, from now on the parties should conduct whatever meetings and exchanges of correspondence are needed to file, at a date which will be determined in due course, a comprehensive joint submission. Meetings, in terms of Rules 65 *ter*(I) and (H), will be held as and when appropriate in order to facilitate this process.
26 April 2006:	Rule 65 *ter* conference.
10 May 2006:	Deadline for Prosecution to file its pre-trial brief, which shall conform to the requirements of Rule 65 *ter*(E)(i). Deadline for Prosecution to file its witness and exhibit lists, which shall conform to the requirements of Rules 65 *ter*(E)(ii) and (iii) and which shall indicate, with respect to each witness, the exhibit(s) the witness will offer in evidence. The lists shall also indicate, with respect to each exhibit, the witness who will offer the exhibit in evidence. With regard to each proposed *viva voce* witness, the Prosecution shall indicate whether the witness will offer written evidence pursuant to Rule 89(F). With regard to each proposed Rule 92 *bis* witness, the Prosecution shall indicate whether it believes the witness should attend for cross-examination.
18 May 2006:	Rule 65 *ter* conference.
26 May 2006:	Deadline for Prosecution to file motion(s) to admit written evidence pursuant to Rule 92 *bis* in accordance with the witness and exhibit lists filed by 10 May 2006.
6 June 2006:	Deadline for Defence teams to file their pre-trial briefs, which shall conform to the requirements of Rule 65 *ter*(F).
30 June 2006:	Deadline for return of all Accused on provisional release to the United Nations Detention Unit in The Hague.
7 July 2006:	Pre-Trial Conference.
10 July 2006:	Commencement of trial.

The pre-trial stage ends with the pre-trial and pre-defence conferences, regulated by Rules 73 *bis* and 73 *ter* respectively. In this context, the Trial Chamber may exercise considerable power in determining the number of witnesses the parties can call as well as the time allocated to complete the presentation of their case. The Trial Chamber may shorten the time estimated for the examination in chief of certain witnesses. It can request that the Prosecutor reduce the number of counts charged in the indictment and may limit the number of crime sites or incidents alleged in one or more of the charges in respect of which evidence may be presented by the Prosecutor. These decisions can be appealed by the parties.

47 *Prosecutor v. Milutinović et al.,* IT-05-87, Pre-Trial Order and Appended Work Plan, 5 April 2006. The trial commenced on 10 July 2006. See also *Prosecutor v. Karadžić,* IT-95-5/18-I, Order following on Status Conference and Appended Work Plan, 6 April 2009.

Several rules related to the trial stage were also amended to confer more control over the proceedings to the bench. Rule 90 (F) states that:

> The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time.

This rule is effective only if read in combination with Rule 65 *ter* whose correct application will allow the Trial Chamber to become familiar with the case beforehand. Consequently, the judges will be in a position to exercise a wide degree of informed control over the proceedings.

Rule 90 (A), according to which "witnesses shall, in principle, be heard directly by the Chambers", was replaced by Rule 89 (F) stipulating that "a Chamber may receive the evidence of a witness orally or, where the interests of justice allow in written form". The adoption of this approach marked the departure of the procedure from the preference accorded to oral evidence.[48]
Finally, Rule 87(C) merged the judgment and sentencing phase into a single unique determination by the judges.[49] The determination of the sentence remains a separate procedure only when the accused pleads guilty.[50]

The reform of the criminal procedure of the ICTY was necessary to tackle the excessive length of its proceedings. The judges, in the plenary session held in July 1998 and in the sessions following, marked a significant departure from many adversarial features that had proven unfit to run war crimes trials.

The changes implemented grant the judges a wide range of judicial control over the proceedings after the pre-trial stage. The appointment of a pre-trial judge allows the Tribunal to ensure, from the onset, that a case is focused on the most relevant issues raised in the indictment. The pre-trial judge has a wide range of powers that allow him to guide the parties to narrow the issues for trial.[51] If the case is clear and well defined after its pre-trial stage, it will be simpler for the judges to control that the presentation of the evidence is coherent with the charges of the indictment. "The tone of court's proceedings tends to be set in the early stages".[52]

48 Rule 89(F) was amended on 1 December 2000. This Rule allowed for the use of witness statements as regulated by Rule 92 *bis* which was also adopted in the plenary held on 1 December 2000. Rule 92 *bis*(A) states that "a Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". The purpose of the rule is to facilitate the admission by way of written statement of peripheral or background evidence in order to expedite proceedings while protecting the rights of the accused under the Statute. Eight Annual Report of the ICTY, 17 September 2001, UN doc. A/56/352.

49 Rule 87(C) states that: If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused. Rule 87(C) was first amended on 10 July 1998.

50 Rule 100 as amended on 10 July 1998.

51 Mundis D.A., *From "Common Law" to "Civil Law"*, Leiden Journal of International Law, 14 (2001), p. 371.

52 Bonomy I., *Making War Crimes Trials Work – Balancing Fairness and Expedition*, in Boas G., Schabas W.A. and Scharf M.A., *International Criminal Justice Legitimacy and Coherence*, Edward Elgar Publishing Limited, 2012, p. 56.

Directing a case from its initial stage will render its conduct at trial swifter and save precious time. The Trial Chamber through the activity of the pre-trial judge and the parties in accordance with Rule 62 *ter* becomes familiar with the case at a very early stage. Therefore, the judges are in a position to make informed decisions on important matters concerning the case, such as, *inter alia*, the allocation of time, the reduction of the witnesses each party can call and the request to the Prosecutor to reduce the number of counts in the indictment.
A certain level of knowledge of the case beforehand puts the judges in the position to intervene more often in the examination of a witness asking meaningful questions where necessary. Finally, it is worth stressing how a "certain familiarity" with the case does not equate to the full knowledge of it that can only be gained through being part of the trial. In other words, before the commencement of the trial the Trial Chamber does not possess the same "full picture" of the case that the Prosecutor enjoys.[53]
The introduction of written evidence at trial is a tool designed to speed up the presentation of evidence. Before this change occurred, the criminal procedure and the practice of the ICTY had shown heavy reliance on the testimony of witnesses which contributed to excessively increasing the length of the proceedings.

Interestingly, even before the described changes in the Rules occurred, several judges had felt the need to interpret the RPE in order to use powers not explicitly spelled therein to expedite the trials.[54] For example, in November 1997, in the case of the *Prosecutor v. Dokmanović*, the Trial Chamber issued an order that called upon the Prosecutor to take the witness statements taken from witnesses she intended to call for trial and other material the Prosecutor intended to rely on at trial. In addition, the Trial Chamber ordered the Prosecutor to file the pre-trial brief, clarifying the allegations in the indictment, setting out in full the details of the Prosecution's case and identifying the points in issue. Finally, the Prosecutor had to file a copy of the proposed opening statements to the Chamber and the Defence.The Chamber put the same obligations on the Defence.[55] Since it was a rather significant departure from the adversarial procedure in place and probably not in line with the Rules, the judges sought and found the agreement of Prosecutor and Defence in a status conference held a week before. The rationale behind this order was the belief that the Chamber would benefit from gaining a better understanding of the legal issues at stake and "a more effective management of the trial".[56] The judges stressed that those documents would not be "regarded as evidence unless and until submitted in the course of trial".[57] This order was a forerunner of the following amendments to the Rules which granted the judges the possibility of becoming familiar with the case before their commencement in order to exercise a more effective and informed control over them.

53 *Prosecutor v. Karadžić*, IT-95-5/18-I, Status Conference, 23 July 2009, p. 386.
54 See Cassese, above n. 15 at p. 385.
55 *Prosecutor v. Dokmanović*, IT-95-13a, Order, 27 November 1997.
56 Ibid.
57 Ibid.

Even after the numerous amendments adopted, the characterisation of the proceedings as a "competition between the parties" did not change, although a degree of cooperation and coordination between the Defence and the Prosecutor's cases was introduced.[58] The parties are therefore not only expected to fight their own battle but also to collaborate in the pursuit of an expeditious and fair trial. The Prosecution and the Defence have to hold meetings to discuss issues related to the presentation of the case; they have obligations to file time saving information to the pre-trial judge and, as will be analysed below, they have broader disclosure obligations.

The reforms of the criminal procedure seem to have sacrificed certain expectations, which in its early stage characterised the work of the ICTY such as contributing to the establishment of a detailed historical record of the war, in order to give the victims an opportunity to be heard and to restore a long-lasting peace in the region through the reconciliation of different ethnic groups in the former Yugoslavia. All these high expectations have proved difficult to reconcile with the main objective of the ICTY, namely the prosecution of the persons responsible for the crimes committed in the former Yugoslavia.[59]

5. Disclosure obligations in the ICTY Rules of Procedure and Evidence

For a trial to be fair an accused must be granted adequate time and facilities for the preparation of his or her defence. The right is envisaged in Article 21 of the ICTY Statute. The accused's right to have adequate time and facilities as discussed in the previous chapters includes the right to have access to the material necessary for the preparation of his case and therefore calls into play the subject-matter disclosure.
In the context of extremely complex criminal trials such as those before the ICTY the right to disclosure assumes an even more stringent importance for the accomplishment of a fair trial.
In the following paragraphs the main rules of procedure and evidence regulating disclosure at the ICTY will be analysed and discussed.

5.1 Rule 66: Disclosure by the Prosecutor

Rule 66 reads as follow:

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and (ii) within the time-limit prescribed by the Trial Chamber or by the pretrial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the

58 Langer, above n. 15 at p. 897.
59 Bonomy I., *The Reality of Conducting a War Crimes Trial*, Journal of International Criminal Justice, 5 (2007), p. 353.

defence when a decision is made to call those witnesses.
(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

Rule 66 regulates the Prosecutor's disclosure to the Defence from the pre-trial stage through to the trial and appeal stage.[60] The timely and meticulous implementation by the Prosecutor of the obligations envisaged in this rule is crucial for the preparation of the Defence's case. Rule 66 has often been the object of controversy despite the ICTY Appeal Chamber's inclination to interpret it broadly in its "plain meaning".[61] The parties have often sought guidance from the Trial Chambers in relation to its application.[62] It is indeed via the reading of the jurisprudence of the Trial Chambers and the Appeals Chamber that it is possible to understand the practical implications of this important rule of disclosure. In essence, it demands that the Prosecution discloses all supporting material that accompanied the indictment at confirmation, all prior statements obtained by the Prosecutor from the accused and all prior statements obtained by the prosecution from the witnesses whom he intends to call at trial.[63]

5.1.1 Rule 66 (A)(i)

The text of Rule 66(A) opens with a reservation clause by which the disclosure obligations envisaged by the rule are subject to the provisions of Rule 53 and Rule 69. Rule 53(A) states that non-disclosure to the public may be ordered, with respect to any documents or information, in exceptional circumstances when the interests of justice so require. The impact of this non-disclosure provision on the Defence's case is limited if compared to the provision of Rule 69(A) (discussed below) which regulates non-disclosure of the identity of victims or witnesses in exceptional circumstances.[64]

Rule 66 (A)(i) requires the Prosecutor "to make available to the defence", within thirty days of the initial appearance of the accused, copies of the supporting

60 Gibson and Lussiaà-Berdou, above n. 2 at p. 315.
61 See *Prosecutor v. Blaškić,* IT-95-14, Appeals Judgment, 29 July 2004, paras. 265-266.
62 *Prosecutor v. Delalić et al*., IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 1.
63 Ibid. at para. 4.
64 See Tochilovsky V., *Jurisprudence of the International Criminal Courts and the European Court of Human Rights*, Martinus Nijhoff Publishers, 2008, pp. 113-114.

material which accompanied the request for confirmation of the indictment as well as all prior statements obtained by the Prosecutor from the accused.[65]
The term supporting material has been interpreted to mean "the material upon which the charges are based".[66] Other material that may be submitted to the confirming judge, such as a brief of argument or statement of facts, is not covered by this Sub-rule.[67] In cases of multiple accused the Prosecutor, when submitting the indictment for confirmation, must specify which supporting material pertains to each accused. It follows that only that specific material will be the object of disclosure to that particular accused pursuant to Rule 66(A)(i).[68]

The second category of material subject to Prosecution disclosure under Rule 66 (A)(i) concerns all the statements of the accused. The Trial Chamber held that "all the previous statements of the accused which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source, must be disclosed to the Defence immediately".[69] No relevance was attributed to the forms that these statements may have. The Prosecutor's suggestion that a distinction ought to be made between the official statements taken under oath or signed and recognised by the accused and the others was dismissed by the Trial Chamber as not in line with the correct interpretation of sub Rule 66 (A).[70]

However such a broad interpretation of the meaning of "previous statements of the accused" was restricted by the same Trial Chamber which, in a later decision, clarified that Rule 66(A)(i) concerns only statements made by the accused "during questioning in any type of judicial proceedings which may be in the possession of the Prosecutor, but only such statements".[71] This interpretation limits the ambit in which statements of the accused are subject to disclosure to the context of judicial proceedings. Interviews or statements given outside this framework (e.g. to the media) are therefore not covered by Rule 66 (A)(i).
The Trial Chamber further specified that "brief of argument and statements of facts"[72] as well as "orders issued freely by the accused himself in the course of his duties, cannot be considered to be prior statements pursuant to Sub-rule 66(A) of the Rules" as "they constitute documents covered by Rule 66 (B)" and therefore they can be inspected by the Defence upon request but there is no obligation on the Prosecution to disclose them within the thirty days envisaged in Rule 66(A) (i).[73] Interestingly, audio or video recording of interviews of suspects with the

65 ICTY RPE, Rule 66(A)(i).
66 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68, 26 February 1999, p. 3.
67 Ibid.
68 Tochilovsky V., *Indictment, Disclosure, Admissibility of Evidence: Jurisprudence of the ICTY and ICTR*, Wolf Legal Publishers, 2004, p. 35.
69 See *Prosecutor v. Blaškić*, IT-95-14, Decision on the Production of Discovery Material, 27 January 1997, para. 37.
70 Ibid.
71 *Prosecutor v. Blaškić*, IT-95-14, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66(A) of the rules and the Decision of 27 January 1997, Compelling the Production of All Statements of the Accused, 15 July 1998. See Schoun C., *International Criminal Procedure, A Clash of Legal Cultures*, T.M.C. Asser Press, 2010, p. 114.
72 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68, 26 February 1999, p. 3.
73 *Prosecutor v. Blaškić*, IT-95-14, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66(A) of the rules and the Decision of 27 January 1997, Compelling the Production of All Statements of the Accused, 15 July 1998.

OTP, which according to the RPE[74] must be transcribed if the suspects in question become accused, are subject to disclosure according to Rule 66(A)(i).[75]

These considerations show how the judicial interpretation of the terminology of Rule 66(A)(i) may have repercussions on the disclosure strategies adopted by the parties. A practical example can be found in *Blaškić* where the Defence had refused to subject itself to reciprocal disclosure in relation to Rule 66(B) material and in so doing it had waived use of that rule.[76] Indeed, as will be discussed below, until 2003 the request made by the Defence to inspect books, objects, photographs and tangible objects in possession of the Prosecution would trigger the same disclosure obligation upon the Defence. It was therefore a matter for consideration by the Defence of whether or not to make use of such a possibility. In *Blaškić* the Defence tried to circumvent the obligation stemming from Rule 66(B) by requesting, under Rule 66(A), the disclosure of the orders previously issued by the accused during the relevant period characterising those documents as "statements of the accused". The Trial Chamber did not allow the Defence's motion. This decision confirms that the boundaries between these two sub rules can be blurred as to the material covered by one or the other and that the role played by the Trial Chamber is crucial in ensuring the fair interpretation and function of the disclosure duties envisaged therein.

The obligation to disclose borne by the Prosecutor is not one that can be exhausted in one act. The Prosecutor is under a continuing obligation to disclose all of the accused's statements that it has in its possession and all statements of the witnesses he intends to call at trial.[77] Disclosure under Rule 66(A)(i) cannot be regarded as complete until the Prosecutor provides the Defence with written statements of all the accused's prior interviews with the Office of the Prosecutor.[78]

5.1.2 Rule 66 (A)(ii)

According to Rule 66 (A)(ii) the Prosecutor, "within the time-limit prescribed by the Trial Chamber or by the Pretrial Judge" must disclose to the Defence copies of the statements of all witnesses whom he intends to call to testify at trial as well as copies of all the transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*.[79] The term "witness statement" employed in Rule 66(A)(ii) is to be interpreted as "the account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime".[80] The ICTY jurisprudence has opted for a broad interpretation

74 Rule 43 (vi) of the ICTY RPE.
75 *Prosecutor v. Čermak and Markač*, IT-03-73, Decision relating to Prosecutor's Disclosure Obligations, 26 March 2004.
76 *Prosecutor v. Blaškić*, IT-95-14, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66(A) of the rules and the Decision of 27 January 1997, Compelling the Production of All Statements of the Accused, 15 July 1998.
77 See *Prosecutor v. Mucić et al.*, IT-96-21, Decision on the Motion by the accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 4.
78 *Prosecutor v. Čermak and Markač*, IT-03-73, Decision relating to Prosecutor's Disclosure Obligations, 26 March 2004.
79 ICTY RPE, Rule 66(A)(ii).
80 *Prosecutor v. Blaškić*, IT-95-14, AC, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 15.

of the term in line with the initial interpretation of "previous statements of the accused" discussed above.

This orientation was confirmed in *Milutinović* where the Trial Chamber held that the Prosecutor's obligation to disclose witness statements "is broad enough to include statements taken by humanitarian organizations for the purpose of recording allegation of human rights abuses when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiries which then result in the persons who gave the original statements becoming witnesses in Tribunal proceedings".[81] In other words, once the Prosecution decides to call a witness it is under the obligation[82] to disclose all statements given by such witness to the Defence whether obtained directly or by another source.[83]

The Appeals Chamber stated that the testimony given in other proceedings also constitutes a witness statement within the meaning of Rule 66 (A)(ii) where a witness is intended to be called by the Prosecutor to testify in relation to the subject matter of the testimony previously rendered.[84] On the contrary, there is no obligation on the Prosecutor to disclose statements given in subsequent proceedings by a witness already heard at trial as he ceases to be a "witnesses whom the Prosecutor intends to call to testify at trial" within the meaning of Sub-rule 66 (A) (ii).[85]

Rule 66(A)(ii) is important insofar as it allows the Defence to familiarise itself with the witnesses the Prosecution will rely on. This disclosure obligation is continuous and therefore should the Prosecutor decide to call additional witnesses to testify, copies of their statements must be provided to the Defence.[86] The rule does not dictate a specific time limit for disclosure leaving it to the discretion of the Trial Chamber or pre-trial judge to prescribe it. However, in Tribunal practice witness' identities and unredacted witness statements must be made available to the Defence at the latest thirty days before the commencement of the trial. Disclosure on a "rolling basis", namely disclosure of a witness identity before the testimony of that particular witness, is no longer accepted by the ICTY practice.[87]

The disclosure of witness's identity and unredacted witness statements must be balanced against the competing interest to grant protection to witnesses and victims as enshrined in Article 22 of the ICTY Statute. The (sometimes complicated) interaction between these two competing interests will be discussed below in the context of the protection of victims and witnesses regulated by Rule 69 of the ICTY RPE.

81 *Prosecutor v. Milutinović et el.,* IT-05-87, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para. 14.
82 Except for material covered by Rule 70 (A).
83 See Tochilovsky, above n. 64 at p. 101.
84 *Prosecutor v. Blaškić,* IT-95-14, AC, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 15.
85 Ibid. at para. 16.
86 Rule 66 (A)(ii) ICTY RPE.
87 Gibson and Lussiaà-Berdou, above n. 2 at pp. 316-317.

5.1.3 Rule 66(B)

Pursuant to Rule 66(B) the Prosecutor shall adhere to the defence request to inspect books, documents, photographs and tangible objects (hereafter material), which are in the Prosecutors possession if they are (1) "material to the preparation of the defence, (2) "intended for use by the Prosecutor as evidence at trial" or (3) were "obtained from or belonged to the accused". These conditions are alternative and not cumulative.[88]

The Trial Chamber is best placed to determine both the modalities for disclosure and also how much time is deemed sufficient for an accused to prepare his defence. However, the Appeals Chamber stated that disclosure at the time of cross-examination is insufficient where the requested material is intended to assist the Defence in its selection of witnesses.[89]
There is no requirement for the Defence to make independent efforts to obtain material prior to receiving requested disclosure under Rule 66(B) which is indeed one of the methods available to the Defence for carrying out investigations.[90]

Rule 66(B) is only triggered by a sufficiently specific request by the Defence.[91] If such request is dismissed or if the Defence considers that the Prosecutor has not fulfilled his obligations under Rule 66 (B) it can turn to the Chamber seeking an order to make the relevant material available for inspection. The Defence, in its application, must identify the documents whose inspection is sought, show that they are in the Prosecutor's custody or control and establish a *prima facie* case demonstrating the materiality of the documents to its case.[92] Establishing a *prima facie* case as to the materiality of the relevant documents to its case is a difficult task for the Defence.[93] The question arises in relation to the reasonable standard to be applied. The threshold cannot be too high, as the Defence has no specific knowledge of the material held by the Prosecutor. On the other hand, a low threshold allowing Defence "fishing expeditions" would lead to an inquisitorial type of disclosure which would not be in line with the intention of the drafters of the Rules and would "undermine the entire disclosure regime of the Tribunal and its aim to strike a just balance between the parties".[94]
The concept of materiality to the preparation of the Defence's case, which defines the first category of material included in Rule 66(B), is a concept that needs a careful

88 Ibid. at p. 322.
89 *Prosecutor v. Bagosora,* ICTR-98-41-AR73, AC, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal Rules of Procedure and Evidence, 26 September 2006, para. 12.
90 Ibid. at para. 11.
91 Ibid. at para. 10.
92 *Prosecutor v. Popović et al.,* IT-05-88, Decision on Popović Motion for Disclosure Pursuant to Rule 66(B) and Request to File an Addendum to Professor Stojkovic's Expert Reports, 6 October 2008, para. 10.
93 The *prima facie* standard characterizes also applications to the Trial Chamber pursuant Rule 68 concerning exculpatory material.
94 Schoun, above n. 71 at p. 113, footnotes 13. See also *Prosecutor v. Delalić et al., IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996*, para. 8 where it quoted the following passage of the judgment in the case of *the United States v. Liquid Sugars, Inc. & Mooney*, 158 F.R.D. 466 (U.S. Dist. Ct. E.D. Cal 1994): The phrase "material to the preparation of the defendant's case is one that causes practical problems on both sides of the discovery equation. On the one hand, a defendant's counsel cannot know in most cases the precise nature of all the documents that should be available, but the defence counsel is going to be hard pressed to specifically argue materiality of individual documents. On the other hand, it is equally clear that the discovery rules do not require "open file" discovery with the defendant being allowed to browse at will through the prosecution files.

assessment. The Trial Chamber clarified that it is for the Prosecution to make the first assessment as to the materiality of the books, documents, photographs and tangible objects relevant to the Defence's case. The Defence can challenge the assessment before the Trial Chamber where it considers it not in compliance with Rule 66(B).[95]

In *Delalić* the Trial Chamber remarked the absence in Rule 66(B) of guidance regarding the process of determining the materiality of evidence.[96] It further stressed that due to the similarity of Rule 66(B) with Rule 16 of the U.S. Federal Rules of Criminal Procedure it was allowed to seek some guidance in the interpretations of the United States rule as well as in the review of its application.[97] The test of materiality was therefore defined as being threefold. The material in question must be: "(1) relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2)".[98]

The relevance of the documents to the preparation of the Defence's case is the test to be used to assess the materiality of the documents at stake.[99] The preparation of the case is a broad concept and does not necessarily require that the material itself counters the Prosecution evidence.[100] The Appeals Chamber, when applying this principle, reversed a Trial Chamber's decision and ordered the Prosecutor to disclose documents related to the immigration, refugee and asylum status of certain Defence witnesses as it considered that they were relevant for the preparation of the Defence's case insofar as they could assist the Defence in one of the most important tasks in the preparation of its case, namely the choice of the witnesses.[101] The Trial Chamber had considered that the immigration documents were not "material to the preparation of the defence case" because they did not counter the Prosecution's evidence presented during its case-in-chief, but rather concerned the credibility of defence evidence.[102] In addition, the Trial Chamber had stated that the immigration documents did not constitute material intended for use by the Prosecution at trial because, in its view, this category refers only to evidence for use during the Prosecution's case-in-chief.[103] The approach of the Appeals Chamber is to be welcomed as it appears more sensible to the right of the

95 *Prosecutor v. Delalić et al*., IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 9.
96 Ibid. at paras. 6-8.
97 On the similarity between Rule 66(B) of the ICTY RPE and Rule 16 of the U.S. Federal Rules of Criminal Procedure see Schoun, above n. 71 at p. 114.
98 *Prosecutor v. Delalić et al*., IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 7.
99 *Prosecutor v. Bagosora,* ICTR-98-41-AR73, AC, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal Rules of Procedure and Evidence, 26 September 2006, para. 9.
100 Ibid. at para. 9. In this decision the Appeal Chamber reversed the Trial Chamber decision and ordered the disclosure of immigration documents of the Defence potential witness considering that they were material for the preparation of the Defence case insofar as they can assist the Defence in one of the most important tasks in the preparation of its case, namely the choice of the witnesses.
101 Ibid.
102 *Prosecutor v. Bagosora,* ICTR-98-41-T, Decision on Disclosure of Material Relating to Immigration Statements of Defence Witnesses, 27 September 2005, paras. 6-7.
103 Ibid.

accused and to the overall effectiveness of the truth finding function of the trial.

The second category of material envisaged by Rule 66 (B) is material that the Prosecutor intends to use as evidence at trial. The Appeals Chamber clarified that the phrase "at trial" must be interpreted as meaning throughout the entire proceedings.[104] The accused's right to inspection is therefore not limited to material related to the Prosecution's case-in-chief.[105] Whereas there is no specific obligation for the Prosecution to disclose to the Defence statements made by witnesses he does not intend to call at trial,[106] this category of material is not per se excluded from the content of Rule 66(B). For instance, in Šešelj the Trial Chamber ordered the disclosure of the witness statements in which the name of the accused was mentioned even if the witnesses were not to be heard at trial by the Prosecutor.[107] In its submission to the Trial Chamber the Prosecutor had accepted that such material could be relevant or possibly relevant to an issue in the proceedings according to the meaning of Rule 66(B).[108]

Finally, the Prosecutor shall permit the Defence to inspect evidence that he obtained from the accused or that belonged to him. From the reading of the text it appears that the discerning element is whether the material concerned is in the possession of the Prosecution rather than whether he has gathered it himself.[109] In relation to the meaning of "in possession", material held by third parties cannot be considered to be in "custody or possession" of the Prosecution, regardless of its relationship with the third parties in question. An exception is applicable where proved that the Prosecution "has some ability to direct and control the relevant person or organization".[110]

Due to their similar *raison d'être* Rule 66 (C) will be analysed below together with Rule 68 (iv) and Rule 70 in the context of the exceptions to disclosure.

5.2 Rule 68: Disclosure of Exculpatory and Other Relevant Material

Rule 68 reads as follow:

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

104 *Prosecutor v. Bagosora,* Appeal Chamber's Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal Rules of Procedure and Evidence, 25 September 2006, para. 9.
105 Ibid. at para. 8.
106 *Prosecutor v. Naletilic and Martinovic*, IT-98-34, Decision on Joint Motions for Order Allowing Defense Counsel to Inspect Documents in the Possession of the Prosecution, 16 September 2002, p. 3.
107 *Prosecutor v. Šešelj*, IT-03-67, Decision on Form of Disclosure, 4 July 2006, paras. 16-17.
108 Ibid. at para. 16.
109 Gibson and Lussiaà-Berdou, above n. 2 at p. 325.
110 *Prosecutor v. Popović et al.*, IT-05-88, Decision on Popović Motion for Disclosure Pursuant to Rule 66(B) and Request to File an Addendum to Professor Stojkovic's Expert Reports, 6 October 2008, para. 11.

(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;
(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;
(iv) the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;
(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

Rule 68 is an important procedural rule whose primary purpose is to secure the fair trial rights of the accused as enshrined in Articles 20 and 21 of the Statute of the Tribunal. The final aim of such rule is also "to enable the Trial Chamber to come to factual findings that are as close as possible to the truth, taking into account Rules 66 and 68 in light of the Tribunal's mandate under chapter VII of the Charter of the United Nations." [111]

The disclosure of evidence that in any way suggests the innocence or could mitigate the guilt of the accused is crucial for the Defence[112] and it is "the most onerous responsibility of the Prosecutor".[113] Rule 68 is also "an important shield in the accused possession"[114] as it grants the Defence the possibility to have exculpatory material disclosed that it otherwise, due to its deficient investigatory apparatus, could probably never have been able to gather.[115] The obligation is indeed placed on the Prosecution due to its "superior and sometimes sole access to this material."[116]

The Prosecution's disclosure obligations are in line with the rationale of disclosure in general, namely to participate in the process of administering justice and to assist the Tribunal in its finding the truth and to do justice for the international community, victims, and the accused.[117]
Such obligations are directly intertwined with the interpretation of the role of the Prosecution in the ICTY legal system and more in general in the administration of

111 *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 27.
112 *Prosecutor v. Krstić*, IT-98-33, AC, Judgement, 19 April 2004, para. 180.
113 *Prosecutor v. Brđanin*, IT-99-36-T, AC, Decision on appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p.3.
114 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, AC, Judgement, 17 December 2004, para. 242.
115 See Gibson and Lussiaà-Berdou, above n. 2 at p. 327.
116 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, AC, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004, para. 17.
117 *Prosecutor v. Karemera et al.*, ICTR-98-44, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Obligations, 30 June 2006, para. 9.

international criminal justice. The Prosecution disclosure's obligations envisaged in Rule 68 are considered as important as the obligation to prosecute.[118]

The jurisprudential characterisation of the functions of the Prosecutor and its impact on the disclosure regime of the Tribunal will be discussed further in this chapter. However it is should be noted that at the ICTY the Prosecutor is under the obligation to disclose material of exculpatory nature that it "encounters" while carrying out its investigation but it has no explicit obligation to search for exculpatory evidence.[119] It will be seen in the next chapter that such obligation has been codified in article 54 of the Statute of the ICC which explicitly regulates the Prosecutor's obligation "to investigate incriminating and exonerating circumstances equally".[120] The difference is significant.

5.2.1 Rule 68(i)

The application of Rule 68 "depends so significantly on the facts of each case".[121] The Prosecution's obligation to disclose exculpatory material should be discharged as soon as practicable, "meaning as soon as the Prosecution becomes aware of the existence of such material or has the possibility to become aware by regularly checking, *inter alia*, its own database."[122] In Karadžić, the Trial Chamber stated that the Prosecutor's obligations under Rule 68 are not met where the search for exculpatory material is carried out on a "rolling basis" namely through a witness-specific approach disclosing the material prior to that particular witness testimony.[123] The Trial Chamber further stated that regardless of what the Defence strategy proves to be and even in case of the accused's failure to identify its defence clearly in its pre-trial brief, the Prosecution's disclosure of exculpatory material should be made as early as the initial appearance of the accused.[124]

The Prosecutor remains obliged at all times to disclose to the Defence any material in its possession or knowledge that might, wholly or in part, be exculpatory.[125] Consequently, the Prosecution's obligation to disclose exculpatory material is continuous. The application of Rule 68 "is not confined to the trial process and continues throughout the proceedings on the relevant case before the Tribunal."[126]

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118 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Motions to Extend Time for Filling Appellant's Briefs, 11 May 2001, para. 14.

119 Gibson and Lussiaà-Berdou, above n. 2 at p. 326.

120 Article 54 of the Statute of the ICC.

121 Harmon M. and Karagiannakis M., *The disclosure of exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules*, in May R. et al., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, 315-328, Kluwer Law International 2001, p. 327.

122 *Prosecutor v. Blagojević et al*., IT-02-60-PT, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 29.

123 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para. 11. See Mundis D.A and Gaynor F., *Current Developments at the Ad Hoc International Criminal Tribunals*, Journal of International Criminal Justice 9 (2011), 481-518, p. 499.

124 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para. 13.

125 *Prosecutor v. Dragomir Milošević*, IT-98-29/1, Decision on Motion seeking Disclosure of Rule 68 Material, 7 September 2012, para. 6.

126 *Prosecutor v. Bralo*, IT-95-17, Decision on Motions for access to ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 29. See also *Prosecutor v. Blaškić*, IT-95-14, AC, Decision on the Appellant's Motions for the Production of Material, suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 32 and *Prosecutor v. Dragomir Milošević*, IT-98-29/1, Decision on Motion seeking Disclosure of Rule 68 Material, 7 September 2012, para. 5.

The Prosecutor can be found in violation of its disclosure obligations under Rule 68 even after the pronouncement of the final judgment.[127]

The text of Rule 68 has been amended substantially since its first adoption. It defines exculpatory material as "material which is known to the Prosecutor and which is favorable to the accused in the sense that it tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence".[128] Exculpatory material also includes "material which may put an accused on notice that such material exists".[129]

In 1995, the phrase "may affect the credibility of the prosecution evidence" was added. Such amendment extended the scope of disclosure to material which not necessarily goes to the innocence of the accused but it has nonetheless the potential to help the defence case by weakening the prosecution evidence. The Appeals Chamber specified that material will affect the credibility of the Prosecution's evidence "if it undermines the case presented by the Prosecution at trial".[130] This is interesting in the light of the scope of the Defence's case which is not to prove the innocence of the accused but to insinuate a reasonable doubt about the strength of the Prosecution's case.

In this context the Appeals Chamber acknowledged the burden that a broader interpretation of its obligation to disclose under Rule 68 puts on the Prosecution's shoulders both in terms of the volume of material to be disclosed and in terms of the necessary effort to assess its exculpatory nature. However, it held that it would be against the interest of a fair trial to limit the rule's scope to material exculpatory "on its face" as suggested by the Prosecution.[131] For instance, a medical certificate stating that a Prosecution witness received mental treatment was considered exculpatory material under Rule 68 due to the fact that it "clearly had the potential to affect the credibility of prosecution evidence" as it concerned the state of mind and memory of the Prosecution's witness.[132]
In 2003, Rule 68 was amended extensively to the point that some commentators have drawn a distinction between an "old" and a "new" Rule 68.[133] The word "material" replaced the word "evidence".[134] This change in the text reflected the jurisprudence of the Tribunal which did not limit the meaning of the word evidence to the material admissible at trial but included any information in any form which falls within Rule 68(A)'s description.[135] A second change concerned the

127 See *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54A, Decision on Motion for Disclosure, 4 March 2010, paras. 5, 8, 45-47.
128 *Prosecutor v. Delalić*, IT-96-21, Decision on the Request of the Accused Pursuant to Rule 68 for Exculpatory Information, 24 June 1997, para. 12.
129 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 Bis, 12 October 2011, para. 38.
130 Ibid.
131 *Prosecutor v. Krstić*, IT-98-33, AC, Judgement, 19 April 2004, para. 180.
132 *Prosecutor v. Furundžija*, IT-95-17/1, Decision, 16 July 1998, para. 16.
133 Zappala' S., *The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, Journal of International Criminal Justice 2 (2004), 620-630.
134 Ibid.
135 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Motions to Extend Time for Filling Appellant's Briefs, 11 May 2001, para. 9; *Prosecutor v. Brđanin & Talić*, IT-99-36, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para 8. See Tochilovsky, above n. 68 at p. 42.

phrase "evidence known to the Prosecutor" that was replaced by the expression "in the actual knowledge of the Prosecutor" which has been interpreted as concerning material which is in the Prosecutor's actual possession.[136]

Exculpatory material arising from related cases regardless of the confidential or the public character of such evidence is also subject to disclosure under Rule 68.[137] In *Blaškić* the Appeals Chamber stated that the OTP is under an obligation to adopt procedures which aim to ensure that the evidence provided by witnesses (who he intends to call to testify) in a different trial is "re-examined in the light of Rule 68 to determine whether any material has to be disclosed."[138] However, even if testimonies rendered in the context of another trial are usually included in the scope of Rule 68 the Prosecution may be exempted from its obligation to disclose if the material in question is known and publicly accessible for the Defence.[139] The Appeals Chamber made a distinction between material of a public character, which does not pose problems in relation to the Prosecution's exemption from disclosure, and material reasonably accessible to the Defence. The Prosecutor is not under an obligation to disclose the latter if the Defence can gain access to such material through the exercise of due diligence.[140] Indeed, the purpose of Rule 68 is not to replace the Defence with the Prosecutor in conducting investigations or gathering material that can assist the defendant.[141]

Moreover, Rule 68 does not grant the Defence the right to receive all the evidence gathered by the Prosecution which could be useful in countering the charges in the indictment.[142] Material which could be of interest for the Defence, which is not exculpatory remains excluded from the application of Rule 68. The exculpatory material should be disclosed in its original form and not in the form of a summary. When redactions are believed to be necessary by the Prosecutor the redacted version of the exculpatory material should however be "sufficiently cohesive, understandable and usable and not taken out of context".[143]

Interestingly, also material pertaining to favourable agreements (such as the budget for payments and benefits paid to witnesses) entered into by Prosecutor's witnesses with the Prosecutor may be object of disclosure under Rule 68.[144] The Trial Chamber in *Halilović* ordered the Prosecutor to provide for the Defence "a list identifying those proposed witnesses who have entered into favorable arrangements, if any,

136 It is also noted that previously the Rule stated that the Prosecutor was under the obligation to disclose evidence that "in any way tends to suggest..." whereas after the amendments the "in any way" was removed somehow narrowing the category of material covered by the Rule See Mundis D.A and Gaynor F., *Current Developments at the Ad Hoc International Criminal Tribunals*, Journal of International Criminal Justice 2 (2004), 642-698.

137 *Prosecutor v. Brđanin*, IT-99-36-T, AC, Decision on appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p.4. See also *Prosecutor v. Blaškić,* IT-95-14, AC, Judgment, 29 July 2004, para. 267.

138 *Prosecutor v. Blaškić,* IT-95-14, AC, Judgment, 29 July 2004, para. 302.

139 *Prosecutor v. Blaškić,* IT-95-14, AC, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 38.

140 See *Prosecutor v. Blaškić,* IT-95-14, AC, Judgment, 29 July 2004, para. 296.

141 *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 26.

142 Ibid. The Defence of one of the accused had sought the disclosure of, *inter alia*, a copy of a report of the Netherlands Institute for War Documentation on Srebrenica.

143 Ibid. at, para. 24.

144 Tochilovsky, above n. 64 at pp. 131-132.

that may go to the credibility of prosecution evidence".[145]

The Prosecution has the exclusive responsibility of assessing the exculpatory nature of the material in its actual knowledge. Such assessment, which confers considerable discretion for the Prosecution, must be done in good faith.[146] The standard for assessing the exculpatory nature of the Prosecution's material is whether there is any possibility, considering the parties submissions, that the information in question could be relevant to the Defence.[147] As a general practice the Prosecutor should identify in respect of all material disclosed to the Defence, the material that had been disclosed pursuant Rule 68(i).[148]

In the absence of proof that the Prosecutor abused its discretion the Trial Chamber will be reluctant to intervene.[149] "The general practice of the Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution's execution of that function in good faith".[150] However, if the Defence believes that the Prosecution has failed to discharge its disclosure obligations it can apply to the Trial Chamber for an order for disclosure. The request should satisfy the Chamber that the evidence sought is of an exculpatory nature and that it is in the Prosecution's possession. "Such request is not required to be as specific as to precisely identify which documents should be disclosed".[151] However, requesting "any exculpatory information in the hands of the Prosecutor" is too general as it is limited to re-state the Rule 68 obligation.[152] The Defence must present a *prima facie* case that would make the exculpatory nature of the material concerned probable.[153]

This scheme places both the burden of proof and the need to monitor the Prosecution's conduct on the Defence. As rightly noted by some commentators, it is almost impossible for the Defence, in the absence of an indication or partial disclosure on the part of the Prosecution, to have knowledge of exculpatory material in the Prosecutor's possession.[154] The possibility for the Defence to challenge the Prosecution's assessment of the exculpatory character of the material in its possession is therefore of limited effectiveness. Interestingly, as it will be discussed in the next chapter, the drafters of the ICC Rules of Procedure and Evidence tried to tackle this problem adopting Rule 83 that regulates the possibility of an *ex parte* hearing aimed at assessing the exculpatory character of evidence.[155]

145 *Prosecutor v. Halilović*, IT-01-48, Decision on Defence Motion for Identification of Suspects and other Categories Among its Proposed Witnesses, 14 November 2003.
146 *Prosecutor v. Dragomir Milošević*, IT-98-29/1, Decision on Motion seeking Disclosure of Rule 68 Material, 7 September 2012, para. 5.
147 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 Bis, 12 October 2011, para. 38.
148 *Prosecutor v. Stanišić and Simatović*, IT-03-69, Order Establishing Work Plan, 19 January 2007, p. 2. Tochilovsky, above n. 64 at p. 126.
149 *Prosecutor v. Blaškić*, IT-95-14, AC, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 39.
150 *Prosecutor v. Bralo*, IT-95-17, Decision on Motions for access to ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 31.
151 Ibid. at para. 30.
152 See Tochilovsky, above n. 64 at p. 138.
153 *Prosecutor v. Gotovina et al.*, IT-06-90, Decision on Ivan Čermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence, 7 august 2009, para. 9.
154 Gibson and Lussiaà-Berdou, above n. 2 at p. 329.
155 Rule 83 of the ICC Statute. See Gibson and Lussiaà-Berdou, above n. 2 at p. 329.

Finally one of the major changes that occurred in the provision of Rule 68 concerns its being subjected to the provision of Rule 70 which regulates matters not subject to disclosure. Before the amendments to the rule, exculpatory material had to be disclosed to the defendant without exception. The relationship between the two rules will be discussed in the context of the exception to disclosure.

5.2.2 Rule 68(ii)

An electronic disclosure system (EDS) was introduced by the 2003 amendments to Rule 68. The EDS does not establish a distinct disclosure obligation but rather a possible means of conveying exculpatory material to the Defence in an electronic format.[156] The material disclosed under Rule 68(ii) is the same material covered by Rule 68(i) but in searchable electronic form. In other words Rule 68 envisages two different ways to disclose the same material.

The Appeals Chamber clarified that the disclosure obligation regulated by Rule 68 is not met by simply granting the Defence access to the electronic database "containing a large amount of documents only a few of which are potentially exculpatory".[157] This method "cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession".[158] The electronic disclosure system does not *per se* make documents "reasonably accessible as a general matter" and it does not allow the assumption that the Defence has knowledge of all material included therein. Consequently, the Prosecution cannot be relieved of its obligations pursuant Rule 68 by simply making available the EDS to the Defence.[159]

The Appeals Chamber did not go as far as stating the right procedure to be followed in disclosure through the EDS, however it warned the Prosecution that by placing a particular piece of material on EDS it had not made that piece of material necessarily "reasonably accessible" to any of the accused.[160] It further stressed that it might be useful if the Prosecutor either created a special file containing Rule 68 material or gave the Defence written notice of such material keeping the special file or the written notice up to date.[161] In other words, in order to meet its obligation under Rule 68 the Prosecution must guide the Defence to the exculpatory material present in the collections of material disclosed electronically.

156 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on adequate Facilities, 10 March 2009, para. 14.

157 *Prosecutor v. Karemera et al.*, ICTR-98-44, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Obligations, 30 June 2006, para. 10. See also *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on adequate Facilities, 10 March 2009, para. 14 and *Prosecutor v. Bralo*, IT-95-17, Decision on Motions for access to ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 35.

158 Ibid.

159 *Prosecutor v. Karemera et al.*, ICTR-98-44, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Obligations, 30 June 2006, para. 15.

160 Ibid.

161 Ibid.

Rule 68(iv) which regulated the Prosecutor's application to the Chamber sitting *in camera* in order to seek relief from its obligation to disclose exculpatory material will be discussed in the paragraph dedicated to the exceptions to disclosure.

5.3 Rule 67: Additional disclosure (Defence disclosure)

Rule 67 reads as follows:

(A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 *bis*, but not less than one week prior to the commencement of the Defence case, the Defence shall:
(i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial; and (ii) provide to the Prosecutor copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, or Rule 92 *quater*, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.
(B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:
(i) the defence shall notify the Prosecutor of its intent to offer:
(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and
(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.
(C) Failure of the Defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.
(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

Defence disclosure obligations have been broadened by several amendments to Rule 67 adopted in 2008. Before the adoption of these amendments the Defence disclosure duties were limited to the defence of an alibi (or other special defences) the accused intended to rely on. This approach reflected the role played by the Defence in the proceedings before the Tribunal in which it does not bear the *onus probandi* of the case, which is instead on the Prosecution's shoulders. After the 2008 amendments the Defence's obligations to disclose have been brought closer to those of the Prosecution's bringing an equality that was not in the intentions of the drafters of the original RPE.

Rule 67 (A)(i) now stipulates that the Defence must permit the Prosecution to inspect and copy books, documents, photographs and tangible objects in its

custody or control which it intends to use at trial. The time limit of the obligation is set by the Trial Chamber at a time not prior to a 98 *bis* ruling (judgment of acquittal at the end of the Prosecution's case) and no later than one week before the commencement of the Defence's case. Before 2003, this disclosure obligation functioned on a reciprocal basis as the Defence's obligation to allow the Prosecutor to inspect books, documents, photographs and tangible objects would only be triggered by a prior request made by the Defence (under Rule 66(B)) to inspect the same material in the Prosecutor's possession. Once the Defence has decided to avail itself of the possibility of inspecting the Prosecution's material it fell under the obligation to allow the inspection of the same material in its possession by the Prosecution. Unlike the previous obligation, the new disclosure obligation is not reciprocal as its application is not dependent on a prior request to the Prosecution for the disclosure of similar material.

Moreover, pursuant to the adoption of Rule 67(A)(ii), the Defence, at the latest one week before the commencement of its case, must disclose to the Prosecutor the statements given by witnesses it intends to call at trial as well as copies of all written statements taken from witnesses whose attendance is required by the Trial Chamber (Rule 92 *bis*), who have given testimony in other proceedings before the Tribunal (Rule 92 *ter*) or who are unavailable (Rule 92 *quater*). This amendment marked a major shift from the mechanism in place before where the Defence did not have any obligation to disclose the names of its witnesses to the Prosecutor before the trial unless it intended to rely upon an alibi or a special Defence.[162]

The jurisprudential background to the adoption of Rule 67(A)(ii) is of interest. Indeed, the issue of whether a Trial Chamber could order the Defence, even in the absence of any provision in the Statute or in the RPE, to disclose its witness lists or previous statements of its witnesses had been tackled by the ICTY Trial and Appeals Chambers. This question called into play, to a certain extent, the principle of the equality of arms between the Prosecution and the Defence in relation to their disclosure obligations.
Two different approaches emerged. In *Tadić* the Trial Chamber rejected a Prosecution motion for the disclosure of prior statements of Defence witnesses.[163] In *Delalić* the Trial Chamber found that the Defence's pre-trial disclosure of its list of witnesses would "not shift the balance of advantage from the Defence, rather it will ensure the observance and maintenance of the parity of opportunity safeguarded by the statute."[164]
The Appeals Chamber in *Alekovsky* opted for the *Delalić* approach holding that

[162] See Klamberg M., *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, 2013, p. 294.

[163] *Prosecutor v. Dusko Tadić*, IT-94-1, Decision on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996. In its separate opinion Judge Vohrah stated that the principle of equality of arms in criminal proceedings should be tilted towards the Defence in order to allow it to gain parity with the Prosecutor in the presentation of the Defence case. It is interesting to note that in the Appeals judgment of this case the Appeals Chamber stated that "a Trial Chamber may, depending on the circumstances of the case at hand, order the disclosure of defence witness statements after examination in chief of the witness. See *Prosecutor v. Dusko Tadić,* IT-94-1, AC, Judgement, 15 July 1999, paras. 22 and 326.

[164] *Prosecutor v. Delalić et al.*, IT-96-21, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para. 46.

"it would be difficult to reconcile with the fairness of a trial that the Defence could be favored at the expenses of the Prosecution."[165]
The adoption of Rule 67(A)(ii) and Rule 65 *ter* (G) transformed into obligations which the Appeals Chamber found was a possibility depending on the circumstances of the case and on the will of the Chamber to intervene *motu proprio*.

Rule 67 (B)(i) stipulates that the Defence is required to disclose to the Prosecutor within the time-limit set by the Trial Chamber or the Pre-Trial Judge its intention to rely on an alibi and in that case it must describe the details of the alibi as well as the witnesses and any other evidence it intends to use to corroborate it.[166] Furthermore, the Defence must disclose to the Prosecutor any special defence it intends to offer indicating the witnesses and evidence it intends to rely upon.[167] We saw that these obligations were the only Defence disclosure duties before the amendments adopted in 2008.

Shortly after the above-mentioned amendments to Rule 67 were adopted, a Trial Chamber made an application seeking the non-applicability of the newly amended rule to an ongoing trial. The Defence sought a declaration that neither the Chamber nor the Prosecution could rely on the amendments to the rule to oblige the Defence to act or to refrain from action.[168] The application was lodged pursuant to Rule 6(D) of the RPE which stipulates that an amendment should not operate to prejudice the rights of the accused. The applicant claimed, *inter alia*, that the rule was prejudicial insofar as it created additional disclosure obligations with no countervailing benefit and restricted the right of the accused to deny the Prosecution permission to inspect certain documents or to deny disclosure of certain statements. The Trial Chamber recalled the difference existing between rights and advantages in its jurisprudence[169] and stated that the "simple fact that the previous version of the Rules did not impose certain disclosure obligations on the Defence does not constitute the right to deny such disclosure".[170] In other words, it qualified as an advantage rather than a right the previous absence of the particular disclosure obligation in question. It concluded that Rule 67(A) did not impinge on the rights of the Defence and it was therefore applicable to the case at stake.

Finally, Rule 67(D) stipulates that if the Defence or the Prosecutor discovers additional evidence, which should have been disclosed previously according to the

165 *Prosecutor v. Aleksovsky*, IT-95-14/1-A, AC, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, paras. 23 and 25.
166 Rule 67(B)(i)(a) of the ICTY RPE.
167 Rule 67(B)(i)(b) of the ICTY RPE.
168 *Prosecutor v. Prlić et al.*, IT-04-74, Decision on Slobodan Praliak's Motion on the Application of Rule 67 (A) of the Rules, 4 April 2008.
169 It made reference to *Prosecutor v. Meiakić*, IT-02-65, Decision on the Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005, para. 123 which reads as follows: The context of the Rule indicates that the "rights" contemplated are confined, at least, to those rights to which an accused, or a convicted or acquitted person, in a pending case has a legal entitlement, and do not extend to that wide variety of advantages or benefits which are frequently described as rights, particularly by those seeking to secure them, but to which there is no legal entitlement.
170 *Prosecutor v. Prlić et al.*, IT-04-74, Decision on Slobodan Praliak's Motion on the Application of Rule 67 (A) of the Rules, 4 April 2008.

Rules, they are under the obligation to immediately disclose such material to the other party and the Trial Chamber.[171]

5.4 Other forms of disclosure

The disclosure of information in proceedings before the ICTY can also occur through non-conventional means of disclosure.[172] As previously mentioned, the changes to the ICTY RPE implemented since their first adoption in 1994 have advanced pre-trial communication between the Defence and the Prosecutor through the creation of pre-trial and pre-defence conferences.[173] In this context Rule 65 *ter* (E) states that within a time limit set by a pre-trial judge and no later than six weeks before the pre-trial conference the Prosecutor must submit its pre-trial brief.
The document must contain a summary of the evidence he intends to bring at trial in relation to each count and a list of the exhibits the Prosecution intends to offer. Moreover, the pre-trial brief must contain a list of all the witnesses the Prosecution intends to call to trial. This includes, *inter alia*, the number of witnesses, their names or pseudonyms and a summary of the facts on which they will testify.

As far as the Defence is concerned Rule 65*ter* (F) stipulates that once the Prosecution has submitted its pre-trial brief the Defence within a time frame decided by the Pre-Trial Judge and no later than three weeks before the Pre-Trial conference the Defence must file a pre-trial brief whose purpose is to enable the Chamber and the Prosecution to have sufficient notice of the content of the Defence's case before the presentation of evidence at trial begins.[174] In its pre-trial brief, the Defence, *inter alia*, must include a written statement describing the nature of its case in general terms. After the close of the Prosecution's case the Defence, pursuant to Rule 65 *ter* (G) is called to file a list of all the witnesses it intends to call at trial including the number of witnesses, their names or pseudonyms as well as a summary of the facts on which they will testify.
The scope of Rule 65 *ter* (G) is to make the Prosecution aware of the main facts upon which Defence witnesses are expected to testify in order to allow it to prepare its cross-examination.[175]

Through the pre-trial briefs the Prosecution and the Defence exchange information on their respective cases in the pre-trial phase giving rise to some unconventional anticipated disclosure, which can assist the expeditiousness of the trial.

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171 However, as noticed by Tochilovsky, when such material may suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution witnesses but at the same time it can be interpreted as supporting the Prosecution's case, the Prosecutor should consult the Defence before disclosing the material in question to the Chamber. The Defence in fact should not be prejudiced by the fact that material which it regards as incriminatory rather than exculpatory is made available to the Trial Chamber under Rule 67(D). See Tochilovsky, above n. 64 at p. 126.

172 See Schoun, above n. 71 at p. 121.

173 See Rules 73 *bis* and 73 *ter* of the ICTY RPE.

174 *Prosecutor v. Šešelj*, IT-03-67, Reasons for Decision on the Accused's Request to File a Pre-Trial Brief, 22 November 2006, para. 8.

175 *Prosecutor v. Stanišić and Simatović*, IT-03-69, Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanišić Defence with Rule 65ter (G) and Rule 67 of the Rules, 12 October 2011, para. 22.

5.5 Limitations to disclosure

5.5.1 Rule 66 (C) and Rule 68 (iv)

Rule 66(C) reads as follows:

Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

Rule 68(iv) reads as follows:

The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

When the Prosecutor applies *in camera* to the Trial Chamber it must submit to it, but only to it, the material whose non-disclosure is sought. Through this procedure the Trial Chamber is exposed to material which will not necessarily become evidence at trial. Thus, the question about what the judges should and should not see presents itself.
The Appeals Chamber dealt with the argument that by reviewing the material the judges of the Trial Chamber are put in the position of unfairly considering the merits of the case before trial. This argument was raised in the context of an order by the Chamber obliging the Prosecution to deliver certain material to the Chamber. Even if the context is different from the procedure envisaged in Rules 66(C) and 68 (iv) the concern is the same, namely that material which is not necessarily admitted into evidence would nonetheless have a weight in the final judgment rendered by the Trial Chamber.[176] The Appeals Chamber however stated that "to be exposed to materials yet to be presented in evidence does not necessarily lead to pre-judgment or partiality." Therefore the presumption of innocence would be guaranteed by the professionalism of the judges of the Trial Chamber.[177]
However, there are still concerns given that it is difficult for a judge to remain indifferent when exposed to potential evidence whose nature must be carefully assessed by him in order to grant or dismiss an application for non-disclosure. Also the Appeals Chamber did not exclude such possibility when stating that the exposure to disclosed material does not necessarily lead to pre-judgment or

176 *Prosecutor v. Blagojević et al.*, IT-02-60-AR73, AC, Decision, 8 April 2003, paras. 25-31.
177 Ibid. at para. 29.

partiality. "Not necessarily" does not equate to ruling out such possibility.

5.5.2 Rule 69: Protection of Victims and Witnesses

The protection of victims and witnesses is enshrined in Article 22 of the ICTY Statute and is given remarkable weight in the Rules of Procedure and Evidence whose Rule 69 reads as follows

(A) In exceptional circumstances, either party may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section.
(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution or Defence.

Rule 69 allows the Prosecutor, through an order of the Trial Chamber, "to either delay or bypass" its disclosure obligations enshrined in Rule 66 in relation to witnesses who may be in danger.[178] It must be read in combination with Rule 75(A) which provides that a Chamber may order appropriate measures for the privacy and protection of victims and witnesses as long as these measures are not inconsistent with the rights of the accused.

It is common practice for the Prosecution to invoke the protection given by Rule 69 for its witnesses, who sometimes are also the victims of the crimes allegedly committed by the accused, and it is from this angle that Rule 69 will be analysed. One Trial Chamber noted "with regret" that granting such protective measures (in relation to Prosecution witnesses) had become the rule rather than the exception in the Tribunal practice.[179] However, the Defence can also request such measures in relation to the witnesses it intends to call at the trial.[180] Where witnesses have been granted protective measures in other proceedings before the Tribunal those protective measures should continue when they are called to testify in another trial.[181]

When assessing a Prosecutor's request for non-disclosure of a witness identity brought under Rule 69 a Trial Chamber is confronted with the difficult task of striking a "fair and proper balance" between the competing interests of the defendant's right to a fair trial which includes the right to know the identity of witnesses the Prosecution intends to call at trial and the necessity of granting protection to victims and witnesses.

178 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements with Confidential Annex, 22 November 2006, para. 2.
179 *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 28.
180 Klamberg, above n. 162 at p. 303.
181 Rule 75(F) of the ICTY RPE. See *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 31.

The elements upon which to strike such a balance are given by the specific case at hand and therefore may differ from case to case. However, the jurisprudence of the Tribunal shows that even if great importance is attached to the protection of victims and witnesses the balance leans towards the right of the accused to know the identity of the witnesses on whose testimony the Prosecutor intends to rely in order to prove his guilt.[182]
This approach appears consistent with Article 20(1) of the Statute which states that "full respect" must be given to the rights of the accused and "due regard" to the protection of victims and witnesses."[183]

The term "identity" when referring to witnesses is not limited to the disclosure of the names of the witness as such information is not sufficient to identify the person whose testimony is used to prove the charges. To know the identity of a witness the Defence has to be informed of "further particulars" about them.[184] "Identifying information would appear to be the sex of each witness, his or her date of birth, the names of his or her parents, his or her place of origin and the town or village where he or she resided at the time relevant to the charges. Such information provides the Defence with adequate notice of who exactly it is that the Prosecution deems essential to the proof of its case against the accused so that the Defence can adequately conduct its own investigations."[185] The present address of the witness is not part of the identifying information.

It is not unusual for a Trial Chamber to issue orders, pursuant to a motion for the Prosecution, for non-disclosure or limited disclosure by the accused to the public of material received from the Prosecution pursuant to Rule 66(A)(i).[186] This kind of consideration shows the difference between the concept of disclosure and the principle of publicity.[187]

In its application to the Trial Chamber the Prosecutor must show the importance of the particular witness for its case and the existence of "exceptional circumstances" in relation to the witness in question. This has been interpreted as "specific evidence of an identifiable risk to security and welfare of the particular witness or to his or her family."[188] The witness' fear as well as broad allegations of dangerous conditions will not suffice to justify an order for non-disclosure.[189] The existence of "exceptional circumstances" must be shown in relation to each and every witness for whom protective measures are sought.[190]

182 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements with Confidential Annex, 22 November 2006, para. 3.
183 *Prosecutor v. Delalić et al.*, IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997, para. 15.
184 Ibid. at para. 17.
185 Ibid. at para. 20.
186 *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 32.
187 Klamberg, above n. 162 at p. 304.
188 *Prosecutor v. Milutinović et al.*, IT-05-87, Decision on Prosecution Sixth Motion for Protective Measures, 1 June 2006, paras. 21-22.
189 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements with Confidential Annex, 22 November 2006, para. 2.
190 *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 28.

However, when the Prosecution proves the importance of the witness to its case and the existence of the "special circumstances" the Trial Chamber will not grant a non-disclosure order where it would infringe upon the accused's right to a fair trial. Elements to be taken into account in this regard are the nature and quantity of the material already disclosed, in non-redacted form, to the accused compared with that for which non-disclosure is sought and the approaching start date of trial.[191]"The nearing start of the trial proceedings certainly has an impact on balancing the right of the accused to a fair trial against the measures in place for the protection of victims and witnesses."[192]

Even when protective measures are granted, the identity of the witness or victim shall be disclosed within a time limit decided by the Trial Chamber in order to allow adequate time for the Prosecution's and Defence's preparations. In fact, there is no opportunity for the Defence to examine the witnesses for the Prosecution in any real sense without a proper appreciation of those witnesses. The basic right of the accused to examine witnesses, read in conjunction with the right to have adequate time for the preparation of his defence, therefore envisages more than a blind confrontation in the courtroom. A proper in-court examination depends upon a prior out of court investigation. Sub-rule 69(C) reflects this by referring to a "sufficient time prior to the trial".[193] However, the non-disclosure measures adopted can be maintained *vis à vis* the public when the circumstances, as assessed by the Trial Chamber, so demand.
Rule 69 (C) does not envisage a time frame for the disclosure of the identity of witnesses to the accused. Rather, to "allow adequate time for the preparation of the Prosecutor or Defence".

The time allowed for the preparation of the case has been interpreted in combination with Rule 75[194] as the time before the trial commences rather than time before the witness testifies.[195] It is Tribunal practice to order disclosure at the latest thirty days before the commencement of the trial.[196] In Šešelj, the Appeals Chamber held that the delayed disclosure of the identity of eight witnesses (of one hundred) after the commencement of the trial but thirty days before the scheduled testimony did not affect the defendant's right to adequate time and facilities to prepare his defence.[197] The Defence can apply to the Chamber seeking change in the measures previously issued. However, it must prove that, notwithstanding the continued existence of the "exceptional circumstances" its right to adequately investigate and prepare its

191 *Prosecutor v. Haradinaj et al*., IT-04-84, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements with Confidential Annex, 22 November 2006, para. 3.
192 Ibid. at para. 16.
193 *Prosecutor v. Delalić et al*., IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997, para. 19. See also Rule 75 of the ICTY RPE.
194 *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 26. See also *Prosecutor v. Brđanin and Talić*, IT-99-36, Decision on Motion by the Prosecution for Protective Measures, 3 July 2000, para. 33.
195 Interestingly the Rule 69(C) of the ICTR RPE allows withholding from the opposing party the evidence and whereabouts of witnesses even after the start of the trial as long as sufficient time for the preparation of the cross-examination is granted to such party. See Klamberg, above n. 162 at p. 304.
196 Tochilovsky, above n. 64 at p. 108-109.
197 *Prosecutor v. Šešelj*, Appeal against the Trial Chamber's Oral Decision of 7 November 2007, 24 January 2008.

case ensures the immediate removal of such measures as opposed to merely thirty days prior to the commencement of the trial.[198]

In *Milošević*, the Prosecutor had first redacted the statements of the witnesses and then sought protective measures under Rule 69. The Trial Chamber remarked that protective measures under Rule 69 must be sought at the time disclosure under Rule 66(A)(i) is envisaged, namely within thirty days of the initial appearance of the accused. The Prosecutor cannot unilaterally decide to disclose the redacted version of identifying information and then apply for particular protective measures at an unspecified later moment.[199] The Prosecutor cannot redact identifying information from the supporting material without prior authorisation from a Chamber.[200] However the Prosecution's unauthorised redactions of information capable of indentifying victims and witnesses from the material it disclosed pursuant to Rule 66(A)(i) of the Rules were accepted when they aimed to ensure the continued protection of potential witnesses in the case, pending the outcome of its motions on protective measures, while enabling the accused to have the supporting materials within the time specified by Rule 66(A)(i) of the Rules.[201]

5.5.3 Rule 70: Matters not subject to disclosure

Rule 70 reads as follows:

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.
(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question

198 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements with Confidential Annex, 22 November 2006, para. 16.
199 *Prosecutor v. Slobodan Milošević*, IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 24.
200 See Tochilovsky, above n. 64 at p. 111.
201 *Prosecutor v. Mico Stanišić*, IT-08-91, Order on Prosecution Motion for Protective Measures for Victims and Witnesses, 1 July 2005.

relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.
(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).
(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.
(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

The Tribunal, unlike a domestic judicial system, cannot count on its own law enforcement agency and must rely on the cooperation of states and organisations to gather useful information in the course of the investigation of a specific case. It is therefore of paramount importance for the functioning of the Tribunal that its Prosecution (but also the Defence) is put in a position where they can gather information from third entities on a confidential basis entering into an obligation of non-disclosure. The structure of the rule, which impacts the Prosecution almost entirely seems to indirectly reflect the structural differences that exist in the Prosecution's and Defence's functions and means of investigations.

Rule 70 (A) stipulates that reports, memoranda or other internal documents prepared by a party or its collaborators which are connected with the investigation or preparation of a case do not fall within the material subject to disclosure as envisaged in Rules 66 and 67. This paragraph, which appears separate from the others was adopted in February 1994 and initially stood alone in the Rules.[202]

Rule 70 is an essential tool which aims to encourage states, organisations and individuals to co-operate by sharing sensitive information with the Tribunal (the Prosecution or the Defence) on a confidential basis. Information providers are assured protection of the information they offer and its sources.[203] "The exceptions to disclosure in Sub-rules 70(B) to (E) were introduced into the Rules to permit the use, as and when appropriate, of certain information which, in the absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or its origin."[204] Without such guarantees of confidentiality, it is "almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfill its functions".[205]

Paragraph (B) of Rule 70 prevents the disclosure of information, without the provider's consent, which was obtained by the Prosecution on a confidential basis

202 *Prosecutor v. Slobodan Milošević*, IT-02-54, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 18.
203 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on the Accused Motion for Order Pursuant to Rule 70 United Kingdom of Great Britain and Northern Ireland, 24 July 2013, para. 4.
204 *Prosecutor v. Blaškic*, IT-95-14, Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, para. 10; see also *Prosecutor v. Brđanin and Talić*, IT-99-36, Public Version of Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, para. 17
205 *Prosecutor v. Brđanin and Talić*, IT-99-36, Public Version of Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, para. 18.

and where such information has been used solely for the purpose of generating new evidence.

Information, testimony and documents referred to in paragraphs (C) and (D) of Rule 70 are intended to relate back to the "information" referred to in paragraph (B).[206] The Appeals Chamber clarified that this information is the information provided to the Prosecution on a confidential basis and not the information which was so provided and which has been used solely for the purpose of finding further evidence. It added that even if there is no doubt that the purpose of providing confidential information will in many cases include the aim of finding further evidence, "the limitations imposed by Rule 70 (B) are not based upon the existence of such state of mind on the part of the provider."[207]
Therefore, for purposes of paragraph (B) the information must be provided on a confidential basis and it must be used solely for the purpose of generating new evidence, "but for paragraph (C) and (D) that requirement necessarily drops out, for once the information is introduced as evidence at trial, it by definition is no longer used solely for the purpose of generating new evidence." [208]

The "information" or "initial information" covered by Rule 70 can be provided also in the form of testimony. The Appeals Chamber held that in such a case it is not only the informant's identity and the general subject of his knowledge that constitute the information envisaged in Rule 70 but also the substance of the information shared by the person in question.

Before its substantial amendments in 2003, Rule 68 disclosure was not subject to Rule 70 and therefore exculpatory material in the Prosecutor's possession had to be disclosed to the defendant.[209] The exceptions to disclosure envisaged in Rule 70 did not relieve the Prosecutor of his obligation to disclose exculpatory evidence to the defendant.[210] The new Rule 68 is expressly subject to the exception to disclosure regulated by Rule 70 and should the Prosecution be provided with exculpatory information as envisaged in Rule 68(i) on confidential basis, he must take "reasonable steps" to obtain the consent of the provider to disclosure of such material or to inform the defendant of its existence.[211] This is how the balance has been struck between the interest of the accused in the disclosure of exculpatory material and the interest of the provider in confidentiality.[212] As will be discussed, the absence of any judicial supervision or control over the Prosecution's "reasonable steps" to obtain consent to disclosure of exculpatory material to the defendant is regrettable.[213] According to this mechanism the Trial Chamber and the accused

206 *Prosecutor v. Slobodan Milošević*, IT-02-54, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 21.
207 Ibid. at para. 21.
208 Ibid. at para. 25.
209 See O'Sullivan E., *The Erosion of the Right to Confrontation Under the Cloak of Fairness at the ICTY*, Journal of International Criminal Justice, 8 (2010), 511-538, p. 529.
210 *Prosecutor v. Brđanin and Talić*, IT-99-36, Public Version of Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paras. 19-20.
211 Rule 68(iii) of the ICTY RPE.
212 Schoun, above n. 71 at p. 124.
213 See O'Sullivan, above n. 209 at p. 530.

may remain unaware of the existence of exculpatory material obtained by the Prosecution pursuant to Rule 70 if the consent of the provider is not given. It appears that the balance between competing interests at this important junction of the ICTY procedure has drifted away from the protection of the accused's right to a fair trial and is in stark contrast with the Tribunal's proclaimed focus on that interest.

The Appeals Chamber has interpreted Rule 70(F) as "enabling the Defence to request a Trial Chamber that it be permitted to give the same undertaking as the Prosecutor to a prospective provider of confidential material that the material will be protected if disclosed to the Defence". It further held that the purpose of Rule 70 is to encourage third parties to provide confidential information to the Defence in the same way that Rule 70(B) encourages parties to do this for the Prosecutor."[214] However, the Defence, unlike the Prosecutor, has to apply to the Chamber to benefit from the application of the rule whose text states that the material object of the application must already be in the Defence's possession. The Trial Chamber assessed this disparity stating that it did not amount to an infringement of the equality of arms principle as "it corresponds to the different roles of the Prosecution and the Defence and their respective duties to disclose material to the opposing party."[215] Interestingly, in reaching this conclusion the Trial Chamber emphasised that the Defence did not (at the time) have the same duty to disclose material to the Prosecution.[216] Finally, the requirement that the Defence applies to the Trial Chamber does not place it at a "distinct disadvantage" as such application can be made confidentially and ex parte to ensure that no prejudice occurs to the Defence. Furthermore, also the requirement that the material concerned must already be in the Defence's possession should not be interpreted literally but should allow the Defence to make an application in advance in relation to material whose provision they are seeking on a confidential basis.[217]

Paragraph (G) of Rule 70 is a safeguard that was intended to guarantee that restrictions on disclosure do not affect the accused's right to a fair trial by granting the Trial Chambers the power to exclude evidence when its probative value is outweighed by the need to ensure a fair trial. The authority "to police" the application of Rule 70 also allows the Trial Chamber a limited enquiry on the confidentiality nature of the information provided. In doing so it performs an objective test consisting of a simple analysis of the information or be limited to "mere assertion" of the Prosecution. The Trial Chamber may turn to the provider of the information for confirmation of its confidential nature.[218] Where doubts still remain on the applicability of Rule 70 to particular information the Trial Chamber may invite the provider and the Prosecution to submit their observation on the issue before ruling on it.[219]

214 *Prosecutor v. Orić*, IT-03-68, Public Redacted Version of the Decision on Interlocutory Appeal Concerning Rule 70, 26 March 2004, paras. 6-7.
215 *Prosecutor v. Brđanin and Talić*, IT-99-36, Public Version of Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, para. 26.
216 Ibid.
217 Ibid. at para. 26.
218 *Prosecutor v. Slobodan Milošević*, IT-02-54, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 29.
219 Ibid. at para. 31.

5.6 Remedies - Rule 68 bis: Failure to Comply with Disclosure Obligations

Rule 68 *bis*, which was adopted in December 2001, reads as follows:

> The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

Rule 68 *bis* does not indicate what kind of sanctions can be inflicted nor the specific circumstances which should trigger their adoption.[220] Moreover, the rule does not go into detail of the nature, procedural or disciplinary or both, of the sanctions it envisages. It is therefore left to the judges' discretion to single out the remedies they consider appropriate for a particular disclosure violation.
This approach was taken on board by the Appeals Chamber which stressed that rules regarding sanctions are not mandatory but discretionary and it is therefore for the Trial Chamber to assess the opportunity to adopt any remedies following a disclosure violation.[221] It further noted that a Trial Chamber could not be considered as having abused its discretion when it did not impose any sanctions on the Prosecutor for its disclosure violations.[222]

When assessing the appropriate response to the Prosecution's non-compliance with disclosure obligations the Trial Chamber will consider whether the Defence has suffered prejudice as a consequence. However, the Defence must not show malice towards the Prosecutor as a precondition for the imposition of sanctions.[223] The practice of the Tribunal shows that the "sanction approach" is not the primary option.[224] The possible violations of Rule 68 are governed less by a system of sanctions than by the judges' definitive evaluation of the evidence presented by either party and the possibility which the opposing party has to contest it.[225] It is worth noting that in a decision delivered almost a year after the adoption of Rule 68 *bis* the Tribunal reaffirmed such a lenient approach towards the Prosecution's disclosure violations.[226] In common practice the Trial Chambers have felt more at ease in granting the Defence some sort of relief in the form of additional time to study the newly disclosed material or the possibility to re-call the prosecutor's witnesses, as opposed to imposing sanctions to the Prosecutor or ordering a stay of the proceedings. In other words, the application of Rule 68 *bis* has focused more on remedy than on sanctions.

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220 See Zappala', above n. 133 at p. 627.
221 *Prosecutor v. Stakić*, IT-97-24, AC, Judgment, 22 March 2006, para. 190.
222 Ibid.
223 Ibid.
224 *Prosecutor v. Brđanin*, IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 23.
225 *Prosecutor v. Blaškić*, IT-95-14, Decision on Defence Motion for Sanctions for the Prosecutor's Continuing Violation of Rule 68, 28 September 1998, p. 3. See also *Prosecutor v. Brđanin*, IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 23.
226 See *Prosecutor v. Blaškić*, IT-95-14, Decision on Defence Motion for Sanctions for the Prosecutor's Continuing Violation of Rule 68, 28 September 1998, p. 3 and *Prosecutor v. Brđanin*, IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 23.

The Appeals Chamber regarded a trial as fair when following a Prosecutor's breach of his disclosure obligations the Defence had been granted the possibility to present additional evidence in appeal.[227] The same conclusion was reached in *Furundžija* where, at the end of the hearings, the Prosecutor disclosed documents related to the medical and psychological condition of an important prosecution witness (who was also a victim). The Trial Chamber acknowledged the serious misconduct of the Prosecutor and the prejudice suffered by the Defence. It therefore ordered the re-opening of the proceedings considering that it was the only available means of remedying the prejudice suffered by the Defence, which was then allowed to call additional witnesses and to re-call the prosecution witnesses in order to integrate their cross-examination in the light of the newly disclosed material.[228]
The Defence had requested that either the witness' testimony was struck out or, in case of a conviction, to order a re-trial. The Trial Chamber also considered the position of the witness/victim concerned concluding that she should have not have had her evidence struck out as a consequence of the Prosecution's misconduct. It therefore opted for the re-opening and integration of the case rather than to strike out part of it.[229] One may wonder whether the conclusion would have been different if the particular witness had not been a victim.
In *Karadžić* the Trial Chamber, at the time of writing, has been confronted with over eighty motions claiming improper or untimely disclosure of evidence by the Prosecution. In one of these motions the accused sought an order for a new trial emphasising the "cumulative effect" of the Prosecution's disclosure violations and the prejudice they caused to the preparation of his defence.[230] The Trial Chamber denied the request pointing out that it had taken the cumulative effect of the Prosecution's disclosure violations into account and that the remedies adopted throughout the trial had avoided prejudice to the Defence.
The Trial Chamber recalled having ordered the suspension of the proceedings on multiple occasions to allow the accused additional time to review the newly disclosed material.[231] Moreover, it stressed that the testimony of some witnesses had been postponed or delayed when the Prosecutor had disclosed specific material related to that testimony far too late.[232]

Still in *Karadžić* the Trial Chamber found that the Prosecutor had violated his disclosure obligations in relation to Rule 68, but since no prejudice for the Defence had been proved it declined to adopt a remedy or sanction. The presiding judge dissented stressing how in the absence of any prejudice resulting from the Prosecution's violation of Rule 68 "it is unnecessary, moot or even frivolous" to issue a declaratory finding that the Prosecution has violated Rule 68 of the Rules

227 See *Prosecutor v. Krstić*, IT-98-33, AC, Judgement, 19 April 2004, para. 180.
228 *Prosecutor v. Furundžija*, IT-95-17/1, Decision, 16 July 1998, para. 16. The scope of the re-opening was limited to issue related to the "medical, psychiatric or psychological treatment or counseling that may have been received" by the witness in question.
229 Ibid. at para. 20.
230 See *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Accused's Motion for New Trial for Disclosure Violations, 3 September 2012.
231 Ibid. at para. 14.
232 Ibid. at para. 15.

as it serves no purpose.[233]

In *Haradinaj* the Trial Chamber acknowledged the Prosecutor's multiple disclosure violations and it reprimanded the Prosecution's Senior Trial Lawyer.[234] However, this decision was reconsidered and abandoned by the same trial Chamber (pursuant a Prosecution motion) concluding that Rule 68*bis* does not envisage personal reprimand which could have only been administered pursuant Rule 46 which regulates misconduct of counsel.[235] The decision was not unanimous and the dissenting judge emphasised that this reading of Rule 68 bis "may foster a climate of impunity by sending attorneys the message that they cannot be held accountable for misconduct unless a Chamber takes the extraordinary step of applying Rule 46."[236]

In *Krnojelac* the Prosecutor was ordered to file a signed report by a member of its trial team certifying among other things that "a full research had been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence".[237] In *Orić* the Prosecutor was ordered to research Rule 68 material providing the Trial Chamber with a declaration stating that such search had been made, where it had been made and its results.[238] In the same case, which was plagued by multiple disclosure violations on the part of the Prosecutor, the Trial Chamber reserved (until the passing down of the judgment) its right to draw reasonable inferences in favour of the accused with reference to the specific evidence object of the disclosure violations. It finally concluded that despite the Prosecution's "less than diligent" approach to its disclosure obligation the accused had not been prejudiced "to the extent of being denied a fair trial".[239] The Trial Chamber also reached that conclusion in the light of its final judgment of the case in which the accused was finally sentenced to two years and released immediately having being in custody for three years.

Statements such as "disclosure practice of the Prosecutor had not been satisfactory"[240] or "the numerous disclosure violations reflected badly on the Prosecution"[241] are not unusual in the Trial Chambers' assessment of the way in which the Prosecution discharges its disclosure obligations. However, despite the Appeals Chamber's statement that it "will not tolerate anything short of strict compliance with disclosure obligations" it appears to be common practice that the Trial Chamber reacts timidly to the Prosecution's disclosure violations.

233 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Accused' Thirty-Seventh to Fourthy-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011. Judge Kwon referred to this partially dissenting opinion in other decisions in which the Chamber issued a declaratory finding of violation of Rule 68 by the Prosecution.

234 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 Bis, 12 October 2011.

235 *Prosecutor v. Haradinaj et al*., IT-04-84, Decision on Prosecutor's Motion for Reconsideration of Relief Ordered Pursuant to rule 68 *bis* With Partially Dissenting Opinion of Judge Hall, 27 March 2012.

236 Ibid. at, paras. 2-6.

237 *Prosecutor v. Krnojelac*, IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999, para. 11.

238 *Prosecutor v. Orić*, IT-03-68, Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005, p.5.

239 *Prosecutor v. Orić*, IT-03-68, Trial Chamber Judgment, 30 June 2006, para. 77.

240 Ibid. at para. 815.

241 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Accused's Motion for New Trial for Disclosure Violations, 3 September 2012, para. 14.

6. Critical aspects of the ICTY Disclosure process

6.1 Preliminary remarks

When defining the right to a fair trial the Appeals Chamber of the ICTY found no reason to depart from the notion developed by the European Convention on Human Rights.[242] It further held that the principle of the equality of arms, which falls within the fair trial guarantee under the Statute, "goes to the heart of the fair trial guarantee" and "obligates a judicial body to ensure that neither party is put at disadvantage when presenting its case."[243] The application of the principle does not encompass financial equality as in criminal proceedings it is accepted that the Prosecutor will have at his disposal resources in terms of personnel, funds and investigative techniques, which will be impossible for a defendant to match. Nonetheless, the respect for the notion of the equality of arms guarantees that, despite these significant differences, the Defence and the Prosecutor are granted the same possibility to present their case and to challenge the case of their opponent. In this regard the Trial Chamber "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case".[244]

However when discussing the scope of the application of the principle the Appeals Chamber emphasised the different context in which the Tribunal operates when compared to domestic courts which have "the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial".[245] The Tribunal must rely heavily on the cooperation of states which in most cases are the sole holders of evidence. It concluded that under the ICTY Statute the principle of the equality of arms must be given a "more liberal interpretation than that normally upheld with regard to proceedings before domestic courts".[246]

It is noted that although the language used in describing the equality of arms principle covers both the Prosecution and the Defence, in practice where violations of this principle have been found, it is because the Defence was somehow unfairly affected in preparing or presenting its case.[247]

In the context of the ICTY the imbalance between the Defence and the Prosecution appears to be structural. The latter is an organ of the Tribunal envisaged by the Statute, which can rely on resources not even remotely comparable with the limited ones enjoyed by the Defence teams. Furthermore, the Prosecution begins the investigations years before the issuance of an indictment whereas the Defence

242 *Prosecutor v. Dusko Tadić,* IT-94-1, AC, Judgement, 15 July 1999, para. 44.
243 Ibid. at paras. 44, 48 and 50.
244 Ibid. at para. 52.
245 Ibid. at para. 45.
246 Ibid. at para. 52.
247 *Prosecutor v. Dusko Tadić*, IT-94-1, Prosecution Motion for the Production of Defence Witness Statements, Separate Opinion of Judge Vohrah, 27 November 1996.

will come into play much later and in any case after the indictment has been issued. It is inevitable that, particularly in the context of international criminal trials, the Prosecutor will be in possession of information that the Defence will not be able to gather itself. The defendant will consequently rely on the Prosecution's disclosure of material relevant to both the Prosecution's and the Defence's case. That makes the Prosecution a source of valuable information for the Defence's case.[248] Disclosure can be considered as one of the practical expressions of the principle of the equality of arms as it can operate to reduce the structural imbalance between the Prosecution and the Defence in the preparation of their respective cases. It is indeed the most relevant among the "adequate facilities" that the accused is entitled to in the preparation of his defence.

The role of the Prosecution in the disclosure procedure is of paramount importance particularly in the light of the characterisation of his functions offered by the Tribunal's jurisprudence. The Prosecutor in fact is considered not only a party to adversarial proceedings but also an organ of the Tribunal and more in general an organ of international criminal justice. He has been defined as a "Minister of Justice with an overriding obligation of ensuring fairness in the proceedings".[249] While the prosecution must be conducted vigorously the prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice."[250] The goal of the Prosecutor is not only to obtain a conviction but also to present the case for the Prosecution assisting the Chamber in discovering the truth in a judicial setting. Therefore, the presentation of the Prosecution's case must include not only inculpatory but also exculpatory evidence.[251] The Prosecutor is a party to the proceedings and therefore is not required to be neutral but he is "not a partisan" and this is the ratio behind its disclosure obligations particularly in relation to exculpatory material. The obligation to disclose is therefore part of the Prosecution's duty as a minister of justice to assist the administration of justice and the accused.[252]

Assessed against this background, the analysis of the ICTY disclosure rules and of the practice of the Tribunal carried out in this chapter highlighted several critical aspects in relation to their compliance with the defendant's rights, which will be discussed below.

6.2 Disclosure by the Prosecutor

The Prosecutor is *sui generis* as he encompasses characteristics which belong to different legal models. He is indeed expected to prosecute as in an adversarial

248 McIntyre G., *Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, Leiden Journal of International Law, 16 (2003), p. 281.
249 Ibid.
250 *Prosecutor v. Barayagwiza*, ICTR–97–19–AR72, AC, Decision (Prosecutor's Request for Review of Reconsideration), 31 March 2000, Separate Dissenting Opinion of Judge Shahabudden, para. 68.
251 *Prosecutor v. Kupreškić et al.*, IT-95-16, Decision on Communication between the Parties and their Witnesses, 21 September 1998, p. 3.
252 Jackson J. D. and Summers S. J., *The Internationalisation of Criminal Evidence Beyond the Common Law and Civil Tradition*, Cambridge University Press 2012, p. 135.

context and at the same time to act as a *super partes* entity of inquisitorial origin. The Prosecution seems to struggle "to establish the equilibrium between these two characteristics assumed to be achievable"[253] and the disclosure of information is one of the ambits in which such difficulties appear more evident. The Prosecution's determination to seek a narrow interpretation of its disclosure obligations reinforces such impression.[254] It has been remarked how the Prosecutor's inability "to adopt this double character imposed on it suggests that the expectations that the prosecution can function consistently under both hats in criminal proceedings of the nature heard at the Tribunal may be an unrealistic one".[255]
It is worth recalling Damaška's warning that mixing procedures as opposed to following either an inquisitorial or an adversarial one can endanger the effectiveness of the fact finding.[256] The research conducted seems to suggest the relevance of such a warning to the nature of the Prosecutorial role in the ICTY legal system as well.

The friction between the competing functions of acting *super partes* as well as a party whose aim is to prove the guilt of the defendant affect the disclosure of information with particular reference to exculpatory material. The disclosure of exculpatory material has a considerable impact on the fairness of the proceedings as it touches upon a type of evidence the importance of which is self-evident. Scholars have noted that both the operation and the application by the Chambers of Rule 68 "have the potential to greatly limit its scope and undermine its utility".[257] It is indeed in relation to the disclosure of exculpatory material that controversies arise as opposed to incriminating material which the prosecution tends to disclose in a rather timely and comprehensive fashion.[258]

In this regard (1) the absence of a codification of the obligation to investigate incriminating as well as exculpatory circumstances equally, (2) the unsupervised discretion granted to the Prosecution in the assessment of the exculpatory nature of the material in its possession and (3) the unmonitored responsibility to take "reasonable steps" to obtain the consent (to disclose) of the provider of (Rule 70) confidential exculpatory material appear to be critical points of the procedure.

First, the expectations placed on the Prosecutor are not adequately reflected and codified in the Statute and RPE where the absence of, *inter alia*, an explicit obligation to investigate inculpatory as well as exculpatory circumstances equally in equal measure is regrettable. In fact, the absence of such provision seems to affect the *super partes* role of the Prosecutor who is under no obligation to search for the exculpatory material, which he would be then obliged to disclose. To encounter something along the way is different than searching for it and the

253 McIntyre, above n. 248 at p. 282.
254 Ibid.
255 See McIntyre, above n. 248 at p. 294.
256 Damaška M., *The Uncertain Fate of Evidentiary transplants: Anglo-American and Continental Experiments*, American Journal of Comparative Law, 1997, p. 852 quoted in Jackson.and Summers, above n. 252 at p. 140.
257 Gibson and Lussiaà-Berdou, above n. 2 at p. 327.
258 Morrissey, above n. 1 at p. 88.

difference is significant when it comes to exculpatory material. In the absence of an explicit obligation it appears somewhat unrealistic to expect that, while carrying out investigations with the intention of building a strong case against the accused, the Prosecutor may actively search for exculpatory circumstances which would weaken his case at trial. In other words, the Prosecution finds itself in the somewhat awkward position of being expected to go against its adversarial character in the attempt to fulfil its inquisitorial task.

Second, the Prosecutor enjoys a great deal of discretion in relation to the assessment of the exculpatory nature of the material in its possession. He is presumed to fulfil his disclosure obligations in good faith and the Tribunal will be reluctant to interfere with the Prosecution's assessment.[259] However, there are multiple factors that can lead to non-disclosure of exculpatory material. For instance, the mass of the material in the possession of the Prosecutor, his imperfect familiarity with it, his lack of knowledge of the Defence's strategy or simply non-disclosure can occur because the Prosecutor does not grasp the exculpatory nature of particular material relevant to the Defence's case.[260] As discussed above, the concepts of exculpatory and potentially exculpatory are rather broad and their actual meaning depends significantly on the nature of the specific case at stake. This is a crucial point of the procedure in which the above-mentioned struggle between the Prosecutor's "two souls" can lead, even involuntarily, to disclosure violations. The Prosecutor is, in fact, put in the position of having to adopt the Defence's perspective in the assessment of the material in his possession while bearing in mind that he has to build a case to prove the accused guilty. The possibility that the latter may influence the Prosecutor's assessment cannot be excluded and it is against this background that the lack of any judicial control over the correct use of the Prosecutor's wide degree of discretion appears unsatisfactory.

Finally, on the impact of the Prosecution's role on the disclosure of exculpatory material we have seen how Rule 68 is subject to the provision of Rule 70 that regulates non-disclosure on confidential grounds. Rule 68(iii) stipulates that should the Prosecution be provided with exculpatory information as envisaged in Rule 68(i) on a confidential basis, he must take "reasonable steps" to obtain the consent of the provider to disclose such material or to inform the defendant of its existence.[261] This is the balance struck between the interest of the accused in disclosure of exculpatory material and the interest of the provider in confidentiality.[262] In this ambit the absence of any judicial supervision or control over the Prosecution's "reasonable steps" to obtain consent to disclosure of exculpatory material to the defendant appears questionable.[263] According to this mechanism, the Trial Chamber and the accused may remain unaware of the existence of exculpatory material obtained by the Prosecution pursuant to Rule 70 if the consent of the

259 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Accused Motion for Inspection and Disclosure, 9 October 2008, para. 6.
260 Morrissey, above n. 1 at pp. 89-90.
261 Rule 68(iii) of the ICTY RPE.
262 Schoun, above n. 71 at p. 124.
263 See O'Sullivan, above n. 209 at p. 530.

provider is not given. The balance between the competing interests at this section of the disclosure procedure seems to have moved away from the protection of the accused's right to a fair trial and is in stark contrast with the Tribunal proclaimed focus on this interest.

On this point it is also noted that the operation of the safeguard enshrined in Rule 70(G) which refers to the Trial Chamber's power to exclude evidence under Rule 89 (D) if its probative value is substantially outweighed by the need to ensure a fair trial is indeed limited to the provision of Rule 70 (C) and (D) regarding material presented as evidence and therefore material for which the consent of the provider has been already secured, but it cannot avoid that exculpatory material remains unknown to the Chamber and the Defence if the Rule 70 provider does not consent to its disclosure.
An example of the effectiveness of this safeguard can be found in *Milutinović* in relation to the Prosecution's request to add General Wesley Clark to the list of its witnesses.[264] The Chamber, confronted with the restrictions to the General's testimony requested by the U.S. Government, the Rule 70 provider, refused to hear the witness. It considered that the restriction of the cross examination of the witness to the content of a summary provided by the Prosecutor (requested by the provider) would be unfair to the Defence. It further remarked that to require the Defence "to seek permission from the Rule 70 provider in advance for examination on a particular subject would oblige them to make disclosure not required by the Rules."[265]
It is clear that the effectiveness of Rule 70(G) is limited to the case in which the Trial Chamber is in the position to assess the weight of the evidence against the defendant's right to a fair trial which implies that the Chamber is presented with that material. This will not happen in the absence of the consent of the Rule 70 provider.

It is somewhat ironic to recall that in 2001 Human Rights Watch issued a report in which it compared the ICTY RPE with President Bush's order establishing a military commission for detainees and praised the ICTY disclosure procedure insofar as it imposed on the Prosecutor a clear obligation to disclose all exculpatory material in its possession.[266] The situation has changed substantially since the adoption of the "new" Rule 68.

Moving away from considerations linked to the role of the Prosecutor, but remaining in the ambit of Rule 68, it is noteworthy that if the Defence believes that the Prosecution has not complied with its Rule 68 obligations in order to trigger the Trial Chambers intervention it must identify the particular material in question.

264 *Prosecutor v. Milutinović et al*., IT-05-87, Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 16 February 2007.

265 Ibid. at para. 27. It is interesting to note how the Trial Chamber in the Milošević case had accepted the restriction on the testimony of General Clark requested by the U.S. Government as not conflicting with the defendant's right to a fair trial. See *Prosecutor v. Slobodan Milošević*, IT-02-54, Confidential Decision on Prosecution's Application for a Witness Pursuant to Rule 70(B), 30 October 2003. This confidential decision became public through an order of the Trial Chamber dated 17 November 2003.

266 Moranchek L., *Protecting National security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, The Yale Journal of International Law, [Vol. 31:477] 2006, p. 500.

Moreover, it must show a *prima facie* case indicating that the Prosecution is in possession of such material as well as in relation to its exculpatory or potentially exculpatory character. Rule 68 therefore calls upon the Defence to bear the burden of proof concerning prosecutorial non-compliance. This part of the procedure is problematic insofar as it does not grant an effective tool to the Defence for questioning the Prosecutorial assessment. This is so considering that in the absence of an "indication or partial disclosure" by the Prosecution the Defence will have no knowledge of the existence of exculpatory material and consequently it will not be in the position to make a *prima facie* case as to the necessity of its disclosure under Rule 68.[267] In other words without at least a hint from the Prosecutor the Defence, as well as the Trial Chambers, will not be aware of potentially exculpatory material in the Prosecutor's possession.

Rules 66 and 68 both envisage the possibility for the Prosecutor to apply to the Chamber *in camera* to be relieved from his disclosure obligation if disclosure may prejudice further or ongoing investigations or for any other reason may be contrary to the public interest or affect the security interests of any state. In this case the Chamber will be provided with the material whose non-disclosure is sought. In this context the Defence appears to be in a disadvantaged position.
In *Blaškić* the Trial Chamber remarked that although it is true that Rule 66 (C) does provide for *ex parte* disclosure by the Prosecutor to the Trial Chamber of the information for which confidentiality is sought, it in no way authorises the holding of *ex parte* hearings on all the measures to be taken to ensure the protection of the witnesses as part of proceedings before the Tribunal.[268] However the Defence will have to argue for disclosure without knowing the material in question, which clearly affects its ability to put forward valid arguments.

Moreover, *in camera* applications lead to the question of whether the Trial judges should or should not see, outside of the trial framework, material whose non-disclosure is being sought (considering that the Prosecution must provide such material to the Chamber, and the Chamber only). The Chamber might therefore see material which will not necessarily be admitted at trial and tested by the Defence. This scenario raises some concerns. In *Kirstic* a memorable intercept in which the accused was shouting "to kill them all" was produced by the Prosecution during cross-examination without prior disclosure. Even if it was not admitted into evidence one may wonder what the impact of such powerful material was on the judges' minds. Although this episode occurred in a different context the concern is the same, namely the potential influence of material submitted by the Prosecutor (seeking its non-disclosure) on the judges and not tested by the Defence.

On this point it is worth recalling the findings of the European Court of Human Rights in the case of *Edwards and Lewis v. The United Kingdom* in which it tackled

267 Gibson and Lussiaà-Berdou, above n. 2 at p. 329.
268 *Prosecutor v. Blaškić*, IT-95-14, Decision Rejecting the Request of the Prosecutor for Ex Parte Proceeding, 18 September 1996.

this issue indicating that the trial judge should not be put in the uncomfortable and dangerous position of seeing material, whose non-disclosure is sought by one party, when such material can have an impact on an issue of fact that the same judge is called upon to decide. In the latter scenario, the trial judge's judgment could be affected by the potential influence of the material showed to him. In the absence of knowing of the material concerned the Defence would have no opportunity to submit any argument to counterbalance such a powerful piece of evidence with clear consequences on the fairness of the proceedings. The Court concluded that an *ex parte* procedure before the trial judge was not sufficient to secure a fair trial where the undisclosed material was related to, or may have been related to, an issue of fact which formed part of the Prosecution's case and which the trial judge, rather than the jury, had to determine and that might have been of decisive importance to the outcome of the applicants' trials.

The considerations presented above seem to call for the creation of an impartial figure, outside the Trial proceedings, which can supervise the disclosure procedure without running the risk of being prejudiced against the accused at a later stage of the proceedings.
This suggestion is not alien to the ICTY context. In *Blaškić,* the Defence, while filing a motion for disclosure of exculpatory material, suggested the appointment of an ombudsman capable of examining the Prosecution's files in order to assess the exculpatory character of the material in its possession.[269] The Chamber declined the proposal despite it appearing valid and convincing even sixteen years after its first suggestion.

6.3 Defence disclosure

The rules of disclosure and the burden they place on the Prosecution and the Defence should reflect and be proportionate to the different roles and functions played by them in the criminal proceedings before the Tribunal. While the Prosecutor is called upon to build a case to prove the guilt of the accused beyond reasonable doubt the Defence can, if it considers it an effective strategy, rely on the presumption of innocence and limit its case to poking holes in the Prosecution's case.
In this context the broadening of the Defence disclosure obligations occurred in 2008 has been defined as "a dramatic shift in evidentiary practice at the tribunals."[270] While the Prosecutor's disclosure duties remain broader than those of the Defence the 2008 amendments appear to bring the Defence closer to the Prosecution in terms of its disclosure commitments therefore diluting the previously marked reflection in the rules of disclosure of the different roles played by the parties at trial.

269 *Prosecutor v. Blaškić*, IT-95-14, Decision on the Production of Discovery Material, 27 January 1997, para. 51. See Zappala', above n. 16 at p. 132.
270 Gibson and Lussiaà-Berdou, above n. 2 at p. 338.

In this context the separate opinion that Judge Vhorah appended to a decision in the *Tadić* case concerning the Prosecutor's request for disclosure of the Defence's witness list (before the intervened amendments of Rule 67) is of interest. He stated that:

"The application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused. To compel the Defence to make available to the Prosecution the prior statement of a witness would afford the Prosecution the opportunity to peep into the Defence Brief for any incriminating material in breach of the doctrine of privilege which undoubtedly forbids the Prosecution access to the work product of Defence Counsel."[271]

The changes in the Defence disclosure obligations seem to infringe the recognised difference in function and scope of the Defence and the Prosecution in the presentation of their case. Moreover they appear to contradict the principle that in adversarial trials the accused has no obligation to assist the Prosecution in the presentation of its case.[272] Interestingly, it has been argued that the principle of the equality of arms in practice has been deprived of its meaning and diminished to "a melodious yet vacuous slogan, a consoling though ineffectual mantra" if assessed against the numerous obstacles that the adversarial structure developed at the ICTY creates to the achievement of real equality between the Prosecution and the Defence.[273] It is noted that while broadened Defence disclosure obligations allow the Prosecutor to become aware of the Defence's case earlier in time and in turn can help achieve more expeditious trials[274], this legitimate goal should not be pursued at the expenses of the rights of the defendant.

6.4 The lack of an effective remedy

Another controversial aspect of the ICTY disclosure regime emerged from the analysis of the application of Rule 68 *bis* which deals with failure to comply with disclosure obligations and envisages a possibility for the Trial Chamber to impose sanctions on a party responsible for disclosure violations.

The lack of specific indications in the Rules as to the sanctions that can be imposed, their nature and the circumstances under which they can be imposed left it to the judges' discretion to single out the remedies they consider appropriate for a particular disclosure violation. We have seen how the Trial Chambers do not sanction the Prosecution for its disclosure violations preferring to grant some sort of relief to the damaged party. This approach is maintained even when multiple disclosure violations occur. The analysis carried out suggests that a more incisive use of the power granted to the judges by Rule 68*bis* could constitute an effective deterrent to misconceived disclosure practice which not only damages the Defence

271 *Prosecutor v. Dusko Tadić*, IT-94-1, Prosecution Motion for the Production of Defence Witness Statements, Separate Opinion of Judge Vohrah, 27 November 1996.
272 See McIntyre, above n. 248 at p. 282.
273 Karnavas M.K., *Gathering Evidence in International Criminal trials – The View of the Defence Lawyer*, in Bohlander M., *International Criminal Justice*, Cameron May 2007, 75, 92. See also Jackson and Summers, above n. 252 at p. 133.
274 Gibson and Lussiaà-Berdou, above n. 2 at p. 344.

in the preparation and presentation of its case but also causes undue delay in the trial.

Another issue raised by the application of Rule 68*bis* is the necessity for the Defence to prove prejudice following a disclosure violation by the Prosecution in order to trigger the adoption of some form of remedy on the part of the Trial Chamber. Even if the Trial Chamber stated that "the burden (to prove prejudice) on the alleging party cannot serve to isolate violations of Rule 68 to the detriment of a fair trial",[275] the practice shows that in the absence of proven prejudice the Chamber will not act upon a disclosure violation.

The Tribunal underlined the importance of a timely and comprehensive system of disclosure (in relation to the names of the Prosecution's witnesses) in order to allow the Defence to have "a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations."[276] Moreover, it acknowledged that the potential cumulative effects of multiple disclosure violations by the Prosecution is likely to place a strain on the resources of the accused in the preparation of his defence.[277]

It is submitted that recurrent disclosure violations negatively impact the "clear and cohesive view" of the Prosecution's case that the Defence can have and on its resources regardless of the specific prejudice suffered in relation to any single episode of non-disclosure or late disclosure. The cumulative effect of multiple disclosure violations occurred throughout proceedings cannot be overlooked. Disclosure should be timely in order to be effective and allow the Defence to prepare and present its case.
While a single disclosure violation can be cured by a remedial approach, a consolidated pattern of non-disclosure or late disclosure, which plagues the entire proceedings, needs a more robust solution. When confronted with multiple disclosure violations the prejudice to the Defence's case should be presumed and the Defence exonerated from what it proves. This would switch the burden of proof from the Defence to the Prosecution. However, such an approach would leave us with the problem of what sanctions could be applied.
I also submit that the absence of prejudice does not *per se* exclude the possibility that the Prosecutor may benefit from non-disclosure or delayed disclosure and that the advantage gained in the presentation of his case would indirectly detriment the Defence.

In light of the above it appears sensible to advocate, as some commentators already have, the necessity of procedural sanctions such as the exclusion of the material disclosed too late as an effective remedy to the Prosecution's disclosure violations.[278]

275 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, AC, Judgement, 17 December 2004, para. 242.
276 See *Prosecutor v. Blaškić*, IT-95-14, Decision on the Production of Discovery Material, 27 January 1997, para. 22 and *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Order on Motion to Compel Compliance by the Prosecutor with Rule 66(A) and 68, 26 February 1998, p. 3.
277 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Eighteenth to Twenty-First Disclosure Violation Decision, 2 November 2010, para. 43.
278 See Zappala', above n. 133 at 620-630.

As things stand, the Prosecution is aware that should he fail to disclose material most likely the Trial Chamber will grant additional time to the Defence or will order the re-call of one or more witnesses. These consequences have little if any deterrent effect.

Concluding, it must be specified that the Rules as they stand would allow in principle the adoption of such measures, it is the practice of the Tribunal which, so far, has not made use of them. I submit that a more explicit codification of the procedural sanctions referred to in this paragraph and of the circumstance which would trigger their imposition could constitute an effective step towards the effectiveness of Rule 68 whereas its timid application seems to defeat its scope and purpose considerably limiting its remedial and deterrent effects.

7. Summary and concluding remarks

The Statute and the RPE of the ICTY established a somewhat adversarial system reflecting the common law tradition. The Tribunal encountered considerable problems in reconciling the goal of fair and expeditious trials with the adversarial system in place. By July 1998, only two trials had been completed and the caseload of the ICTY had grown quickly.

In 1998 several elements of the inquisitorial tradition were imported in the RPE granting the judges a wide range of judicial control over the proceedings since their pre-trial stage in order to improve their expeditiousness. However, the approach to the proceedings as a "competition between the parties" did not change even if a degree of cooperation and coordination between the Defence and the Prosecutor's cases was introduced.[279]

The ICTY system codified the right to a fair trial and the Tribunal's practice acknowledged the principle of the equality of arms between the Prosecutor and the defendant in criminal trials as going "to the heart of the fair trial guarantee."[280] The Tribunal however, highlighted the importance of a more liberal interpretation of the equality of arms principle in the light of the particular nature of its trials and of the context in which it is called to operate.

The ICTY adopts a procedural equality between the parties and accepts the duty to assist them providing the necessary facilities in the presentation of their cases.

In this framework, the disclosure of information is an essential feature of the principle of the equality of arms as it can play a crucial role in reducing the existing structural gap, in terms of resources and capacity to investigate, between the Prosecution and the Defence, assisting the latter in obtaining material which

279 Langer, above n. 15 at p. 897.
280 *Prosecutor v. Dusko Tadić,* IT-94-1, AC, Judgement, 15 July 1999, paras. 44, 48 and 50.

it otherwise would never have been able to gather.
At the same time disclosure is the ambit in which the frictions between the "two souls" of the Prosecution's composition reveal themselves more clearly.

The assessment of the Tribunal's disclosure regime carried out in this chapter showed that the duality of the Prosecution's functions envisaged by the Tribunal's jurisprudence appears to have negative repercussions on the disclosure regime. The fact that the Rules do not reflect the Prosecution's role as a Minister of Justice in its relationship with the Defence, the absence of judicial supervision over the Prosecution's discretion and the possibility that exculpatory material in possession of the OTP may remain unknown to the Defence and the Trial Chamber impact on the fairness and effectiveness of the disclosure system.

The analysis carried out illustrated other critical aspects of the ICTY's disclosure procedure which are not strictly related to the role of the Prosecution. This includes the broadened Defence disclosure marking a departure from the former limited duties on the Defence that better reflected the difference in the scope of the cases of the Defence and Prosecution; the Prosecution's in camera applications for non-disclosure which do not grant a real opportunity to the Defence to make its case for disclosure; the issue of prejudice in relation to Article 68bis sanctions; the Tribunal's practice of not imposing procedural sanctions for disclosure violations and the limited effectiveness of the safeguards envisaged by the RPE in relation to confidential material ex Rule 70.

In the light of the above one may wonder whether a more inquisitorial investigation system envisaging the judicial supervision of a pre-trial judge, with the creation of an open dossier accessible to the Defence coupled with a clear codified obligation on the Prosecutor to investigate both inculpatory and exculpatory circumstances, could be a more suitable and effective option in the context of complex international criminal trials.[281]

The system could envisage the creation of an impartial figure, outside of the trial proceedings but operating parallel to it, in charge of dealing with all the disclosure motions without having to decide issues to which this material is relevant at trial.

Finally, an adequate sanctioning regime that included specific procedural sanctions in cases of disclosure violations, less dependent on the issue of prejudice and from the discretion of the judges, could guarantee an effective deterrent action.

The ICTY will soon close its doors and any change in its procedure regarding disclosure could have only a limited impact for the future. However, the analysis of the critical points emerged in its disclosure regime can be of benefit for current and future international, *ad hoc* or mixed Tribunals. The ICTY experience can

281 On this point see Schoun, above n. 71 at p. 134.

be of assistance in the search for a workable disclosure regime which, taking into account the differences in resources and roles between the Prosecution and the Defence, could accommodate competing interests without infringing the defendant's right to a fair trial which should eventually prevail to guarantee the legitimacy of the judgments it delivers.

VII. Disclosure of information in the legal system of the International Criminal Court

Introduction

"At present, the International Criminal Court embodies the most representative attempt to harmoniously blend different traditions, in the field of criminal justice".[1]

"The International Criminal Court, governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community."[2]
This is how the website of the International Criminal Court (hereafter ICC or Court) begins its presentation and these few lines already highlight several differences with the ICTY which for the purpose of this work is used as a term of comparison.

The ICC was created by a treaty and not by the United Nations (hereafter UN) through a resolution adopted under Chapter VII of the UN Charter. It is a self-standing independent international organisation. It is a permanent institution without an expiry date and it was not established to prosecute perpetrators of crimes committed within a specific conflict and time frame. These are significant differences which had repercussions in the negotiation of the Statute and on the drafting of the Rules of Procedure and Evidence of the Court (hereafter RPE or Rules). Both instruments present several peculiarities unknown to their predecessors that will be discussed in this chapter.

The drafters had to reconcile principles of law belonging to different judicial systems such as common and civil law. The compromise appears more balanced than the first ICTY structure arising from the first draft of its Rules of Procedure and Evidence, which, as discussed in the previous chapter, was ostensibly based on the common law tradition.

As in the previous chapter, it is useful, before turning to the scrutiny of the provisions regulating the disclosure of information before the ICC, to dwell briefly on the description of the procedure before the Court. This effort does not intend to lead to a detailed analytical picture of the proceedings or to analyse each aspect of them in depth. On the contrary, it aims to provide the reader with an idea of the structure of the pre-trial and trial stage of the proceedings to allow a better understanding of the context in which the disclosure obligations are discharged.

Then the disclosure process will be tackled. With the intent of avoiding repetitions the scope of the scrutiny will be limited to the major differences emerging between the ICC and the ICTY disclosure rules. The existing similarities between the two

1 Caianiello M., *Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?*, International Criminal Law Review 10 (2010) 23-42, p. 24.
2 http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx

systems will be acknowledged without elaborating on them as they have been discussed in the previous chapter.

The scrutiny will first deal with the Prosecution's disclosure obligations and then with the Defence's disclosure duties. The role of the Pre-Trial Chamber (hereafter PTC) will be discussed before moving to the analysis of the exceptions to disclosure and to the friction between confidential agreements between the Prosecution and a third party and the rights of the accused with some reference to the *Lubanga* case. The remedy and sanction for disclosure violations will be touched upon before formulating some critical remarks on the main issues discussed in the chapter.

1. The ICC judicial system

1.1 The ICC instruments

For the purposes of this work this brief introductory analysis will be limited to some features of the Statute, the RPE and the Regulations of the Court, which are the three main instruments that establish the structure of the ICC and regulate the procedure to be followed in its proceedings. The Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries held in Rome on 17 July 1998[3] and it is the primary source of the ICC judicial system.[4] It holds a higher status insofar as in case of conflict with other instruments its provisions will prevail.[5]

The ICC Statute covers certain procedural areas that in other Tribunals such as the ICTY are entirely left to the Rules of Procedure and Evidence. Disclosure is one of these. In fact, several articles of the ICC Statute make direct or indirect reference to the disclosure of information, *inter alia*, in relation to the rights of the accused (Article 67), the confirmation of the charges before trial (Article 61) and the functions and powers of the Trial Chambers (Article 64) as well as the duties and powers of the Prosecutor (Article 54).

Part 4 of the Statute sets out the composition of the Court foreseeing the Presidency, the Chambers (Pre-Trial Division, the Trial Division and Appeal Division), the Office of the Prosecutor (hereafter OTP) and the Registry.[6]

Unlike with the *ad hoc* Tribunals, in the ICC proceedings the victims are granted a participating position if the Chamber considers it appropriate and not in contrast with the rights of the accused and with the conduct of a fair and expeditious trial.[7] According to Article 75 of the Statute victims are also entitled to seek reparation, restitution, compensation and rehabilitation.[8]

3 UN Doc. A/CONF.183/9.
4 See Article 51(4) and (5).
5 ICC Statute, Articles 9 and 51.
6 ICC Statute, Article 34.
7 Article 415 bis CPP
8 The position of the victims *vis* à *vis* the disclosure of information remains outside the scope of this work.

The Rules of Procedure and Evidence of the ICC were drafted by the Preparatory Commission and were then adopted by the assembly of the States Parties in September 2000.[9] A first significant difference with the *ad hoc* Tribunals can be seen in that the ICC RPE were not drafted and adopted by the judges of the Court. In addition, the procedure to amend the Rules passes through the approval of the Assembly of States Parties.[10] However, the Statute contemplates the possibility that in case of urgency, amendments may be adopted by the judges and subsequently accepted or rejected by States Parties. A separation appears to have been drawn between the legislative and the judicial power which was unknown to the *ad hoc* Tribunals where the judges were empowered by the Statute with the drafting of the Rules of Procedure and Evidence.

The ICC approach is the outcome of the negotiation of the Rome Statute in which states showed the will to maintain a certain degree of control over the newly born Court. However, this approach, which is unsurprising given the reluctance with which states delegate their sovereignty to international institutions, comes at some costs in terms of flexibility and adaptability of the judicial system to needs or problems that may arise only through the practice of the Court.

We have discussed in the previous chapter how the ICTY was able to adjust its procedure to the complexity of the proceedings through constant amendments to the RPE. These amendments were drafted by the judges of the Tribunal, who are in the best position to appreciate what may be needed to run fair and expeditious trials. In other words, the power to amend the Rules was granted to the ICTY judges, which allowed the system to respond and adapt to challenges which could not be foreseen at the time of the drafting of the RPE. The different course of action chosen by the drafters of the ICC Statute could prove detrimental as it may affect the ability of the system to respond to any needs that arise.

A counter argument, as Guariglia noted, is that Rules of Procedure and Evidence enhanced by judges enjoy less legitimacy than RPE which are the outcome of extensive negotiations among a remarkable numbers of states.[11] However, the capacity of the RPE to accommodate unpredicted needs arising from the proceedings will depend on the approach, whether rigid or responsive, that the States Parties will be inclined to follow when confronted with suggestions or urgent amendments from the ICC judges.[12]

The third ICC instrument discussed here is established by Article 52 of the Rome Statute which allows the judges to adopt the Regulations of the Court.[13] The Regulations are necessary for the routine functioning of the Court.[14] They

9 The Preparatory Commission completed its work on 30 June 2000.
10 ICC Statute, Article 51(3).
11 Guariglia F., *The Rules of Procedure and Evidence for the International Criminal Court*, in Cassese A., Gaeta P. and John R.W.J., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1133.
12 Ibid. at pp. 1119-1120.
13 The Regulations of the Court were adopted, by absolute majority, after consultation with the Prosecutor and the Registry on 26 May 2004. See Schabas W., *An Introduction to the International Cirminal Court*, Cambridge University Press, 2007, p. 199.
14 Article 468 CPP

established two Offices of Public Counsel (one for defence counsel and one for victims counsel) with the Registry.[15] This third instrument (apparently less state controlled) must be circulated for comments to States Parties and is considered adopted only after six months in the absence of comments or objections.[16] There were no objections or comments to the Regulations of the Court as proposed by the ICC judges. The Regulations are relevant to the disclosure procedures before the Court.[17]

1.2 The investigations and the pre-trial stage

The ICC jurisdiction can be triggered by the UN Security Council, the State Parties and the Prosecutor.[18] When the Prosecutor receives information concerning a particular situation or once such situation has been referred to the ICC by a State party or by the UN Security Council, the Prosecutor carries out a preliminary examination in order to decide whether or not to initiate an investigation.[19] When the Prosecutor is acting *motu proprio* his discretion, unlike the discretion given to his colleagues operating in the *ad hoc* Tribunals, is not absolute as it is subject to the scrutiny of the Pre-Trial Chamber (hereafter PTC) which is self-standing and independent from the Trial Chambers (hereafter TC). The PTC constitutes one of the most significant features of the procedural system envisaged by the Statute.[20]

When deciding whether to investigate, the Prosecutor must consider if the information provided constitutes a reasonable basis to believe that a crime covered by the ICC jurisdiction has been or is being committed; if the case would be admissible; and if taking into account the gravity of the crime and the interests of the victims there are nonetheless reasons to believe that the beginning of an investigation would be against the interest of justice.

Once the Prosecution has decided to initiate an investigation the Pre-Trial Chamber begins work as it is required to supervise the Prosecutor's decision assessing whether or not, in the light of the Prosecutor's request and the supporting material, there is a reasonable basis to proceed with an investigation.[21] If the Prosecution has decided not to initiate an investigation the State making the referral or the Security Council may demand judicial intervention from the Pre-Trial Chamber to review the decision. If the Prosecutor has declined to proceed with an investigation because the "interest of justice" so demand, pursuant Article 53 (2)(c), the Pre-Trial Chamber can review the decision of its own motion even in the absence of a third party demand. The Pre-Trial Chamber authorisation to investigate is not requested when a situation is referred to the ICC by the Security Council or a State Party. The Prosecution's discretion may also be limited by the Security Council of the United

15 Regulations 77 and 81.
16 ICC Statute, Article 52(3).
17 See Regulation 54 of the Regulation of the Court.
18 ICC Statute, Article 13.
19 Article 53 ICC Statute.
20 *Ex multis*, see Orie A., *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, in Cassese A., Gaeta P. and John R.W.J., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1485.
21 ICC Statute, Article 15(4).

Nations which can, acting under the umbrella of Chapter VII of the UN Charter, prevent the start or stop the continuation of an investigation (or prosecution) for a (renewable) period of twelve months.[22]

Unlike the ICTY's judicial system the ICC Prosecutor is statute bound, in order to establish the truth, to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is a criminal responsibility under this Statute and, in doing so, investigates incriminating and exonerating circumstances equally".[23] One commentator described this provision as an attempt "to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems".[24] It will be discussed below in greater detail how this provision has positive implications in relation to exculpatory material (and its disclosure) which becomes part of the focus of the Prosecutor's investigation. Looking at the characterisation of the role of the Prosecution through the lenses of this provision a more inquisitorially fashioned figure emerges.

The interaction between the Prosecutor and the Pre-Trial Chamber characterises the issuance of an arrest warrant of a person (or a summons to appear) which can be issued by the PTC after the beginning of an investigation upon an application by the Prosecutor.[25] It is noteworthy that once a person has been arrested he can apply to the competent authority in the custodial State for provisional release pending trial.[26] In deciding on the application the competent domestic authority must give full consideration to the Pre-Trial Chamber's recommendations on the issue.[27]

The Pre-Trial Chamber plays an active role during the investigation as it has the authority, among other things, to issue orders and warrants, to provide for the protection of victims and witnesses and to authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having previously obtained the cooperation of that State.[28] Moreover, if the Prosecutor deems that an investigation presents a "unique investigative opportunity" to gather evidence which might not be available at a later date he must turn to the Pre-Trial Chamber which can provide the permission.[29] This approach applies to both incriminating and exculpatory evidence which may become unavailable at a further stage. Interestingly enough the PTC can, if convinced that the Prosecutor failed to secure a unique investigative opportunity to gather evidence favourable to the Defence, take the necessary measures on its own initiative.[30] This decision can be appealed by the Prosecutor. This provision was one of the most controversial and was

22 ICC Statute, Article 16.
23 ICC Statute, Article 54.
24 Bergsmo M. and Kruger P., *Article 54*, in Triffterer O., *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck – Hart – Nomos, 2nd Edition, 2008, p. 1078.
25 ICC Statute, Article 58.
26 ICC Statute, Article 59(3).
27 ICC Statute, Article 59(5).
28 ICC statute, Article 57(3).
29 ICC Statute, Article 56.
30 ICC Statute, Article 56(3).

vigorously debated between common and civil law lawyers in the negotiations of the Statute.[31]

In light of the above, it emerges that the Pre-Trial Chamber monitors and supervises the Prosecution's performance during the investigation in line with an inquisitorial judicial tradition. As noted by Boas, the role of the Pre-Trial Chamber can be compared to the function of the judge for the preliminary investigation (*giudice per le indagini preliminari*) envisaged by the Italian Criminal Code discussed in chapter two.[32]

As far as the confirmation of the charges is concerned the ICC procedure envisages a hearing before the Pre-Trial Chamber to confirm the charges on which the Prosecutor intends to proceed at trial.[33] The confirmation hearing can be considered as the line separating the investigation phase from the pre-trial stage.[34] The Statute specifies that it should be held within a reasonable time after the surrender or voluntary appearance before the Court. The presence of the suspect at the hearing allows him to object to the charges, challenge the Prosecution's evidence and produce his own evidence. However, his presence is not a *sine qua non* condition for the confirmation of the charges as the Pre-Trial Chamber may on its own motion or, upon the Prosecutor's request, proceed in the absence of the person charged if it is found that he waived his right to be present by fleeing or he cannot be found and all reasonable steps have been taken to contact him and to inform him about the charges and the date of the confirmation hearing.[35] In order to confirm the charges the Pre-Trial Chamber must be presented with "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[36] Before the commencement of the trial and after the confirmation of the charges the Prosecutor can, with the permission of the Pre-trial Chamber and after notice to the accused, amend the charges. However if new charges are added another confirming hearing must be held to allow the accused to challenge the new charges.[37]

At the end of the confirmation hearing the Pre-Trial Chamber may confirm the charges, decline to confirm them or adjourn the hearing requesting that the Prosecution provide further evidence, to conduct further investigation in relation to a particular charge or to amend a charge because the Pre-Trial Chamber considers that the evidence presented would appear to establish a different crime under the ICC jurisdiction.[38] In *Bemba* for instance the Pre-Trial Chamber was not satisfied by the Prosecutor's failure to specify, in the document containing the charges, whether

31 See Orie, above n. 20 at p. 1475, footnote 148.
32 Boas G., *Comparing the ICTY and the ICC: Some Procedural and Substantive Issues*, Netherlands International Law Review, Volume 47, December 2000, p. 283.
33 ICC Statute, Article 61.
34 See Ambos K., *International Criminal Procedure: "Adversarial", "Inquisitorial"or Mixed?*, International Criminal Law Review 3, 2003, p. 10.
35 Article 61(2)(b). In the struggle to find a compromise between different legal traditions, the drafters chose to adopt the more neutral formulation of "person charged" rather than suspect. The same approach can be detected in relation to the absence of the term indictment which is substituted by the expression "document containing the charges".
36 ICC Statute, Article 61.
37 ICC Statute, Article 61.
38 ICC Statute, Article 61(7).

the alleged crimes had been committed in the context of an international or a non-international armed conflict and therefore it ordered the Prosecutor to provide such clarification.[39] When the Pre-Trial Chamber declines to confirm the charges the Office of the Prosecutor is not precluded from requesting their confirmation a second time if new evidence is produced.[40] A decision shall be rendered within sixty days from the end of the confirmation hearing.[41] The records of the Pre-Trial proceedings are transmitted to and kept by the Registrar.

1.3 The trial proceedings

Following the confirmation of the charges the Presidency of the Court will set up a Trial Chamber for the conduct of the upcoming proceedings. There are no trials *in absentia*.[42] The Trial Chamber will hold a status conference with the parties to set the starting date of the trial.[43]

The Trial Chamber must conduct the trial and ensure that it is fair and expeditious.[44] The judges have been granted significant active powers in order to run the trial smoothly. To this aim the Trial Chamber, *inter alia*, provides for the disclosure of documents or information, not previously disclosed, in sufficient advance of the commencement of the trial to enable adequate preparation for trial.[45] Moreover, the Trial Chamber is empowered to provide for the protection of confidential information and order the production of additional evidence.[46]

In addition, Regulation 54 of the Regulations of the Court stipulates that at a status conference the TC may, *inter alia*, "order the production and disclosure of the statements of the witnesses on which the participants propose to rely".[47] This includes the Defence on whose disclosure the Trial Chamber can have influence through the provision of Rule 79(4) which restates the Chamber's power to order the disclosure of any other evidence to the Defence.[48]

The Trial begins with the reading of the charges which have been confirmed.[49] The Trial Chamber must be satisfied that the accused understands the nature of the charges against him before affording him the opportunity to make an admission of guilt or to plead not guilty.[50] Article 65 of the ICC Statute envisages the possibility of a guilty plea which is referred to as an admission of guilt and the procedure to

39 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-323, Request for Clarification on Document Containing the Charges, 4 November 2008.
40 ICC Statute, Article 61(8).
41 Regulations of the Court, Regulation n. 53.
42 ICC Statute, Article 63.
43 ICC RPE, Rule 132. Other status conferences are held on different issues such as, *inter alia*, the length of the evidence to be relied on, the production and disclosure of the statements of the witness to be called at trial and the disclosure of evidence.
44 ICC Statute, Article 61(11) and Article 64(2).
45 ICC Statute, Article 64(3)(c).
46 ICC Statute, Article 64(6) (c) and (d).
47 Regulation 54 of the Regulations of the Court.
48 ICC RPE, Rule 79(4).
49 See Articles 326-328 CPP.
50 *Cordero F, Procedura Penale* (8th Edition), 2008. Cordero states that if the prosecutor disregards [evidence favourable to the suspect], ICC Statute, Article 64(8)(a).

be followed in such case.[51] The Trial Chamber is not bound by a guilty plea and can order the continuation of the trial according to the ordinary procedure if it is not satisfied that the admission of guilt is supported by the facts of the case or where the interest of justice and victims so demand.[52]

If the accused enters a not guilty plea the trial begins. Even if the RPE only foresees closing statements by the parties after the submission of evidence, the accused has the right to make unsworn written or oral statements in his defence. The statement may take place at any time including the opening stage of the proceedings.[53] Interestingly enough, according to the RPE the parties can decide the order in which the evidence is presented.[54] When an agreement cannot be reached the Presiding judge gives directions to the parties in relation to the presentation of evidence.[55] However it is usually the Prosecution, which bears the *onus probandi*, that presents its case first. Also the Trial Chamber can play an active role in the submission of evidence by requiring the attendance and testimony of witnesses and the production of documents when it considers it necessary in order to unveil the truth in relation to the crimes the accused is charged with.[56]

As far as the questioning of witnesses is concerned, the party that calls a witness will be the first to question him, followed by the other party.The Trial Chamber can ask its questions before and after the witness has been questioned by the parties.[57] The Defence will always be the last to address a witness.[58] Witnesses can be questioned on any relevant matter including credibility and reliability.[59] The evidence is submitted through the testimony of witnesses, both during the examination in chief and during the cross-examination.

Questions of admissibility or relevance of evidence should be raised by the parties, or by the Chamber of its own motion at the moment at which the evidence is submitted to the Chamber and dealt with accordingly.[60] An untimely objection will be precluded unless the party raising it was not aware of the issue at the time the evidence was produced and is able to prove so.[61] Leave to appeal is necessary to appeal, *inter alia*, decisions issued by the Pre-Trial or Trial Chamber when they involve issues which "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".[62]

When the submission of evidence is declared as closed by the Presiding judge, the parties are invited to make their closing statements.[63]

51 ICC Statute, Article 65.
52 Ibid.
53 Sluiter G., Friman H., Linton S., Vasiliev S. and Zappala' S., *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 550.
54 ICC RPE, Rule 140
55 ICC Statute, Article 64(8) and ICC RPE, Rule 140.
56 ICC Statute, Article 64(6) (b) and (d).
57 ICC RPE, Rule 140(2).
58 Ibid.
59 Ibid.
60 ICC RPE, Rule 64.
61 Ibid.
62 Article 468 CPP.
63 ICC RPE, Rule 141.

The Trial Chamber will then begin its deliberation to reach a verdict which is referred to in the Statute as a "decision" and not as a "judgment".
If the attempt to reach a unanimous verdict is not successful it will be given by a majority of judges.[64]
The decision must be given in writing and it must be justified.
In case of a majority verdict the decision must give account of the position of the minority. Interestingly, according to Regulation 55 of the Regulations of the Court, the Trial Chamber may characterise the facts differently to accord with the crimes under Article 6, 7 and 8, of the Statute. In addition, the Trial Chamber can change the form of participation.[65] In the decision on the guilt of the accused the Trial Chamber "shall establish principles relating to reparations to, or in respect of, victims including compensation, restitution and rehabilitation."[66]
To this aim the Court may make an order directly against the convicted person.[67]

If the Trial Chamber is satisfied that the accused is guilty beyond reasonable doubt it delivers a guilty verdict and it proceeds to assess the appropriate sentence to be imposed.[68] Unlike the ICTY (after the amendments of the RPE on this issue) the sentencing procedure at the ICC is separated by the decision on the guilt of the accused.
A specific hearing to hear submissions and receive evidence on the sentence shall be held at the request of one of the parties.[69] Even when there is no such request the Trial Chamber can decide to hold the hearing. The person who has been found guilty can submit evidence seeking a mitigation of the sentence such as evidence showing his effort to reduce the suffering of the victims.[70]
The Prosecution can also adduce evidence to prove the bad character of the person found guilty.

It is noteworthy that Article 85 and Rules 173-175 regulate the right to compensation of a person unlawfully arrested or detained and the procedure to follow when seeking such compensation. The ICTY statutory framework does not envisage a similar provision.[71]

2. Disclosure obligations in the ICC Statute and Rules of Procedure and Evidence

2.1 Introduction

In the statutory and procedural framework of the ICC the Prosecutor's and Defence's disclosure obligations differ significantly thanks to their respective roles

64 ICC Statute, Article 74(3).
65 Regulation 55 of the Regulations of the Court.
66 ICC Statute, Article 75.
67 Ibid.
68 ICC Statute, Article 76.
69 ICC Statute, Article 76 and ICC RPE, Rule 143.
70 Schabas, above n. 13 at p. 305.
71 See Zappala' S., *Compensation to an Arrested or Convicted Person*, in in Cassese A., Gaeta P. and John R.W.J., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1577-1585.

in the proceedings.[72] While the Prosecutor bears the *onus probandi* of the case as well as the duty to investigate incriminating and exculpatory circumstances equally, the Defence's role is "largely reactive" to the presentation of evidence by the Prosecutor.[73]

We have discussed that the issue of disclosure is inevitably intertwined with the principle of the equality of arms. The ICC procedural framework makes no exception to this. In *Banda and Jerbo* the Appeals Chamber of the ICC (hereafter AC) restated that the disclosure process is essential in ensuring the fairness of the proceedings and in ensuring that the rights of the defence are respected, with particular reference to the principle of the equality of arms.[74] In *Lubanga* the Trial Chamber stated that the fundamental right to a fair trial includes an entitlement to disclosure of exculpatory material.[75]

The issue of disclosure gave rise to confrontation in the negotiations of the Statute and the RPE.[76] The Rules of Procedure and Evidence regulating the disclosure regime at the International Criminal Court are very similar to the ICTY Rules.[77] During the negotiation of the Rome Statute two different approaches to disclosure were promoted by the Australian delegation and the French delegation. The former was in favour of a two stage disclosure separating disclosure for the purpose of the confirmation hearing from disclosure before trial, whereas the French delegation favoured one single disclosure stage to take place at a very early stage of the proceedings.[78] The two-stage approach eventually prevailed.

In light of the structure of the procedure at the ICC the disclosure of evidence can be divided into disclosure before the confirmation hearing and the disclosure before trial.[79] These two stages are characterised by a different scope of the material disclosed insofar as at the confirmation hearing stage the Prosecutor will submit evidence sufficient to convince the Pre-Trial Chamber of the existence of "sufficient grounds to believe that the person committed each of the crimes charged", whereas the second stage of disclosure concerns evidence used by the Prosecutor to prove the guilt of the accused "beyond reasonable doubt".[80] However, as is discussed below, what material should be disclosed to the Defence and communicated to the Pre-Trial Chamber remains a question which is answered differently by the Chambers of the ICC.

72 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, para. 36.
73 Ibid.
74 *Prosecutor v. Abdallah Banda Abakaer Nourain and Sale Mohammed Jerbo Jamus*, ICC-02/05-03/09, AC, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, para. 34.
75 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 77. The TC cited the jurisprudence of both the European Court of Human Rights and the ICTY.
76 See Orie, above n. 20 at p. 1482.
77 See Tochilovsky V., *Prosecution Disclosure Obligations in the ICC*, in Dora J., Gasser H.P., Bassiouni M.C., *The Legal Regime of the International Criminal Court, Essays in Honor of Prof. Igor Blishenko,* Martinus Nijhoff Publishers, 2009, p. 844.
78 Ibid. at pp. 844-845.
79 Ibid. at p. 844 and Schoun C., *International Criminal Procedure a Clash of Legal Cultures*, T.M.C. Asser Press, 2010, p. 275.
80 See Sluiter et al., above n. 53 at p. 1089.

The ICC criminal procedure in relation to disclosure draws a distinction between the procedure of *inter partes* disclosure *stricto sensu* and the obligation to allow the other party to inspect books, photographs, maps and tangible objects.[81] While disclosure between the parties in its more traditional meaning requires a more active role for the parties who are obliged to hand in material to their counterpart, inspections entail a more "passively open" attitude on the part of the parties who must let their opponent have access to certain material in their possession. An example of *inter partes* disclosure is given by the Prosecutor's delivery of exculpatory material to the Defence; an example of material subject to inspection can be found in *Lubanga* where material relating to the general use of child soldiers in the Democratic Republic of the Congo was considered as belonging to this category.[82]

A further distinction exists between "disclosure" which takes place between the Defence and the Prosecution and the following "communication" of the disclosed material to the Pre-Trial Chamber.[83] The communication of the material to the Pre-Trial Chamber allows it to carry out, *inter alia*, its duty to ensure that disclosure takes place under satisfactory conditions.[84] This issue is closely linked to the issue of the creation of a record of the pre-trial proceedings as well as to the complex issue of how much of the trial the TC should be allowed to see, discussed below.

The provisions of Article 61(3) of the Rome Statute and Rule 121(3) and (6) regulate the obligations to disclose which refer only to the pre-confirmation hearing stage. Another set of provisions applies to disclosure throughout the entire proceedings and they can be found in section II of Chapter IV of the Rules of Procedure and Evidence. Specifically, Article 67(2) and Rules 76, 77 and 83 regulate the Prosecutor's disclosure obligations while Rules 78, 79 and 80 are devoted to the Defence's disclosure duties.[85] Furthermore, Rules 81 and 83 concern the restrictions to disclosure and Rule 84 regulates the production of additional evidence for trial.

Moreover, the issue of disclosure is touched upon through the regulation of the function of two of the ICC organs (OTP and Chambers), in several articles of the Rome Statute. But it is not regulated in great detail therein. As with the ICTY, at the International Criminal Court the role played by the Prosecutor and the Chambers (Pre-Trial and Trial) according to their statutory powers as well as the jurisprudential interpretation of such roles have significant implications on the functioning of the disclosure procedure. Article 54 (Duties and powers of the Prosecutor with respect to investigations), Article 57 (Functions and powers of the Pre-Trial Chamber), Article 61 (Confirmation of the charges before trial) and Article 64 (Functions and powers of the Trial Chamber) are the relevant articles in this context.

81 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, p. 4.

82 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 82.

83 ICC RPE, Rule 122, para 2 (c). See also *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, para. 42 and *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, p. 4.

84 See ICC RPE, Rule 121(2)(c).

85 See Brady H., *Disclosure of Evidence*, in Lee R.S., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers 2001, p. 407.

Another type of disclosure which concerns the material used by the Prosecutor in support of his request for the issuance of an arrest warrant is recognised in the ICC procedure and will be briefly tackled in the next subsection which opens the analysis of the Prosecution's disclosure obligations.

2.2 Prosecution disclosure duties during the investigations

Under the ICC procedure the Prosecutor can apply to the Pre-Trial Chamber seeking an arrest warrant for a suspect. He must submit supporting material showing that there are sufficient grounds to believe that the person has committed a crime under the jurisdiction of the Court.[86] A question arises in relation to the person's entitlement to the disclosure of this supporting material. This subsection discusses the answer given to this question by the ICC Chambers.

Neither the Statute nor the Rules explicitly regulate the disclosure of documents to a person subject to an arrest warrant before he surrenders to the Court. Nonetheless, even in the absence of explicit statutory provisions disclosure may take place during the investigation and its details have been further developed by the jurisprudence of the Court.

In the *Mbarushimana* case the Defence requested the Prosecutor disclose material related to the arrest of Mr. Mbarushimana with the aim of (i) challenging the validity of the arrest warrant as envisaged by Rule 117 (3) of the ICC RPE, (ii) applying for interim release and (iii) challenging the admissibility of the case.[87] The OTP responded that it would consider such request at the appropriate time. The Defence then turned to the Pre-Trial Chamber with a request for disclosure. The Prosecutor maintained that such request was untimely and emphasised, *inter alia*, the absence of any statutory basis for "pre-surrender disclosure".

The Pre-Trial Chamber acknowledged that the right to the disclosure of documents for the three purposes identified by the Defence is not explicitly set forth in the Statute or in the Rules.[88] However, it stressed that the Appeals Chamber had confirmed the existence of the right to disclosure for the purposes of seeking interim release.[89] Furthermore, in relation to the purpose of challenging the validity of the arrest warrant the PTC noted that "the grounds on which such challenge can be made are similar to the grounds for seeking interim release" and consequently access to the same documents is necessary.[90]
Dealing with the third purpose for seeking disclosure, namely to challenge the admissibility of the case, the Pre-Trial Chamber highlighted that Article 19(2) of

86 ICC Statute, Article 58.
87 See Heinze A., *International Criminal Procedure and Disclosure: An Attempt to Better Understand and Regulate Disclosure and Communication at the ICC on the Basis of a Comprehensive and Comparative Theory of Criminal Procedure*, Dunker & Humblot, Berlin, May 2014, p. 413.
88 *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Defence Request for Disclosure, 27 January 2011, para. 10.
89 Ibid. The Pre-Trial Chamber quoted the Appeals Chamber's Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of the Pre-Trial Chamber III entitled Decision on application for interim release, in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-323, issued on 16 December 2008.
90 Ibid. at para. 11.

the Rome Statute explicitly provides for a challenge by a person for whom a warrant of arrest has been issued and therefore it concluded that to exercise the right access to relevant documents is necessary.[91]

The ICC Appeals Chamber in *Bemba* made reference to the jurisprudence of the ECtHR on the right of an arrested person to have access to proceedings (adversarial and in which the equality of arms is ensured) to assess "the compliance with the procedural requirements, the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the legitimacy of the ensued detention"[92] and to have access to the relevant documents "in order to challenge the lawfulness of the arrest warrant effectively".[93]

The Appeals Chamber stated that "in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case."[94] At the same time the ICC judges acknowledged the necessity of accommodating the competing interests of the protection of witnesses and victims and the need to safeguard the ongoing investigation.[95]

In this particular case the AC noted that the applicant had not had at his disposal all the documents and evidence relating to the grounds for his detention when the PTC had rendered its decision on the application for interim release. However, it concluded that the Pre-Trial Chamber had not erred in issuing its decision at that point considering its effort to ensure disclosure of information, the need to protect witnesses and victims and the duty to render a decision without undue delay.[96] Furthermore, the Appeals Chamber emphasised that the arrested person might have an interest to a prompt decision even in the absence of full disclosure and that following the latter he can apply again for interim release, in a more informed fashion, if his previous application was not successful.[97]

In the light of the above it can be concluded that even in the absence of an explicit statutory provision regulating the disclosure of the material used by the Prosecutor to support his application for an arrest warrant, the ICC appears to allow this possibility for the purposes of applying for interim release, challenging the legality of the supporting material and challenging the admissibility of the case. However, the mere absence of full disclosure before a decision on interim release is issued will not *per se* lead to its reversal on appeal.

91 Ibid. at paras. 12-13.
92 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-323, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of the Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008, para. 29.
93 Ibid. at para. 30.
94 Ibid. at para. 32.
95 Ibid. at para. 33.
96 Ibid. at paras. 39-40.
97 Ibid. at para. 39.

2.3 Prosecution disclosure duties prior to the confirmation hearing

2.3.1 Preliminary remarks

The hearing to confirm the charges against the suspect was an unknown feature in international criminal procedure prior to its adoption by the ICC Statute.[98] The nature of the confirmation hearing and its impact on the disclosure of evidence were hotly debated during the negotiation of the Statute.[99] Common law lawyers conceived it as a rather straightforward procedure whose aim would be to prevent proceedings in which the Prosecutor was unable to gather sufficient evidence to establish substantial grounds that a crime under the Court's jurisdiction had been committed. Civil lawyers on the other hand, interpreted it as a more articulated procedure. The two different understandings had repercussions on the obligations regarding disclosure of evidence at this stage as common lawyers advocated limited disclosure obligations whereas civil lawyers supported more extensive ones.[100]

The result is a compromise where the hearing's purpose is to filter the cases which should be sent to trial on the basis of the result of the Prosecutor's investigation but at the same time the suspect has the possibility of participating in the hearing challenging the charges and the evidence presented by the OTP. [101]

The Rome Statute stipulates that the Pre-Trial Chamber must assess whether the Prosecutor gathered and presented sufficient evidence "to establish substantial grounds to believe that the person committed each of the crimes charged".[102] It is not a hearing which intentends to determine the innocence or guilt of the suspect and therefore the scope of the evidence produced is also different to a certain extent from the evidence presented at trial.

We have seen that at the ICTY the indictment is confirmed by a single judge (the so-called reviewing judge) through a swift *ex parte* hearing that does not involve the Defence and the Prosecutor will produce evidence supporting the indictment without any counter argument or counter evidence from the other side. In the procedural structure of the International Criminal Court the charges on which the Prosecutor intends to seek trial must be confirmed by the Pre-Trial Chamber at the confirmation hearing. This procedure, which is more articulated and complex than the one envisaged by the ICTY RPE, involves both parties and entails significant disclosure obligations for the Prosecutor. The ICC clarified that the confirmation hearing should not be seen as a "mini trial" or a "trial before trial" but rather as a step to ensure that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crimes with which he has been charged.[103] In relation to the Prosecutor's disclosure the Pre-

98 See Nerlich V., *The Confirmation of Charges Procedure at the International Criminal Court,* Journal of International Criminal Justice, 2012, p. 1.
99 Schoun, above n. 79 at p. 282.
100 Ibid.
101 Ibid. On the interpretation of the function of the confirmation hearing see Heinze, above n. 87.
102 ICC Statute, Article 61, para. 7.
103 See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, paras. 63-64. For a different view see Zappala' S., *Symposium – Lubanga before the ICC*, Journal of International Criminal Justice, 2008, p. 468.

Trial Chamber stressed that the focus of Prosecution's disclosure must be not on the amount and volume of the evidence disclosed but on the true relevance of the evidence to the case.[104]

In preparation for the confirmation hearing, status conferences are held by the Pre-trial Chamber "to ensure that disclosure takes place under satisfactory conditions".[105] Decisions regarding disclosure in preparation for the hearing to confirm the charges are usually taken by a single judge of the Pre-Trial Chamber.[106]

2.3.2 Article 61(3): Confirmation of the charges before trial Rule 121(3): Proceedings before the confirmation hearing

In preparation for the confirmation hearing the Statute and the Rules of Procedure and Evidence of the ICC regulate a disclosure process which, depending on the Defence's strategy, can be almost unilateral and concern only the Prosecutor. The ratio behind these disclosure duties is to allow the suspect to become familiar with the charges against him and the evidence the Prosecutor intends to use during the hearing to confirm them. These provisions are briefly touched upon in this subsection.

Article 61(3), in the relevant part, reads as follows:

Within a reasonable time before the hearing, the person shall:
(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

Rule 121(3) reads as follows:

...The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

Article 61(3) states that the Prosecutor must, within a reasonable time before the confirmation hearing, provide to the person a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial.[107] Moreover, within the same time frame, the person must be informed of the evidence the Prosecutor intends to rely on at the confirmation hearing.[108]

104 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, para. 67.
105 ICC RPE, Rule 121(2)(b).
106 Article 57(2)(b). See Klamberg M., *Evidence in International Criminal trial: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers 2013, p. 280.
107 The person at this stage of the proceedings is the suspect. We have seen that also the terminology employed in the drafting of ICC legal instruments was the outcome of a civil law common law compromise which tried to avoid terms which would be the expression of one system rather than the other. Sometimes long sentences were privileged over straight forward terms which would be the product of a typical civil law or common law system. Another example (in this same article as well as in the rest of the instruments) is the absence of the term indictment which was substituted by the term "document containing the charges on which the Prosecutor intends to bring the person to trial".
108 ICC Statute, Article 61(3)(a) and (b).

Rule 121(3) underpins Article 61(3) in relation to the relevant time frame for disclosure stating that within thirty days before the confirmation hearing the Prosecutor must provide the Pre-Trial Chamber and the suspect with a detailed description of the charges as well as with a description of the evidence the Prosecutor will rely on at the hearing. The time frame set by Rule 121(3) (and 6 in relation to the Defence) appears to be binding if read in combination with Rule 121(8) which states that "the Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired".[109] It appears therefore that the exclusion of the evidence in question follows from a delay in presenting the Pre-Trial Chamber with the description of evidence that each party intends to rely upon in the hearing. In addition to this, the Prosecutor is statute bound to disclose the exculpatory evidence in his possession as soon as practicable.[110] This is a continuous obligation to which the Prosecutor is subject throughout the entire proceedings.

2.3.3 Rule 121(2)(c): Proceedings before the confirmation hearing

The material that has been disclosed between the parties in preparation of the confirmation hearing must be communicated to the Pre-Trial Chamber. This communication enables the PTC to perform its function in relation to the confirmation hearing among which is an obligation to ensure that disclosure occurred satisfactorily. This subsection analyses the relevant provisions regulating this issue as well as the different approaches developed by the PTC jurisprudence in relation to their operation.[111]

Rule 121(2)(c) reads as follows:

2. In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued. During disclosure:
...
All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.

Rule 121(2)(c) states that all evidence that the Prosecutor and the suspect have exchanged for the purposes of the confirmation hearing has to be communicated to the Pre-Trial Chamber.[112]

The jurisprudence of the ICC on the pre-confirmation hearing's disclosure and communication appears to have developed two different interpretations of the term "all evidence".
The first interpretation follows the so called "bulk rule" according to which only the evidence which will be used at the confirmation hearing should be disclosed to the

109 ICC RPE, Rule 121(8).
110 ICC Statute, Article 67(2).
111 For detailed discussion on the different positions of the Pre-Tril Chambers on this issue see Heinze, above n. 87.
112 See ICC RPE, Rule 121(2)(c).

Defence and communicated to the PTC.
The second interpretation adopts what has been referred to as the "totality rule" which requires the Prosecutor to disclose the evidence that is of true relevance to the case (exculpatory and incriminating), and extends the scope of the communication to the PTC to all the material exchanged between the parties regardless of their intention to use it at this hearing.[113] This dichotomy, which finds its origin not only in a different interpretation of the relevant provisions but also in a different understanding of the role of the Pre-Trial Chamber,[114] is still present in the absence of a ruling by the Appeals Chamber. Questions arise as to the preferable interpretation as well as on whether inculpatory and exculpatory evidence should be treated the same way for the purposes of disclosure at this stage of the proceedings. I will return to this issue in the subsection devoted to the critical remarks at the end of the chapter.

The first approach ("bulk rule") was followed by the Pre-Trial Chambers in the *Lubanga* and *Katanga* cases. The judges recalled that the Prosecutor's disclosure obligations for the purposes of the confirmation hearing concern the "bulk of the potentially exculpatory evidence or evidence which could be material to the preparation of the Defence" and not all the evidence in the Prosecutor's possession.[115]

In *Lubanga* the Prosecutor argued that the bulk of the disclosure of the exculpatory material to the Defence should take place between the confirmation hearing and the trial. The single Judge disagreed stating that disclosure should occur before the confirmation hearing.[116] In the same case the Defence had sought access to the Prosecutor's entire file arguing that this kind of full disclosure was indispensable in order to challenge the charges and present evidence at the confirmation hearing.[117] The Single Judge concluded that the Statute and the RPE do not grant the Defence the entitlement to disclosure or inspection of any material which the Prosecutor does not intend to use at the confirmation hearing and which is neither potentially exculpatory nor relevant to the Defence's preparation for such a hearing.[118] These provisions "are based on the premise that the criminal procedure before the International Criminal Court does not provide for full access by the Defence to the entire Prosecution file".[119] Moreover, "all evidence" which must be communicated to the Pre-Trial Chamber is only the evidence which the Prosecution intends to rely on at the confirmation hearing.[120]

113 *Fairness at the International Criminal Court*, An International Bar Association's Human Rights Institute Report Supported by the John D and Catherine T MacArthur Foundation, August 2011.
114 See *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Second Decision on issues relating to disclosure, 15 July 2009, Partly dissenting Opinion of Judge Cuno Tarfusser, para. 1. Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for Disclosure, 24 January 2012, para. 11. See also Heinze, above n. 872.
115 See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 154; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 124; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 8.
116 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, paras. 121 and 124.
117 Ibid. at para. 8.
118 Ibid. at para. 11.
119 Ibid. at para. 12.
120 Ibid. at para. 41.

The opposite approach (or "totality rule") can be detected in *Bemba* where the PTC required the Prosecutor to disclose all the material of true relevance to the case regardless of its exculpatory or incriminating nature.[121] Moreover, it stated that in order to conduct an independent assessment of the case the Chamber "should not be confined to the evidence which the parties intend to rely on for the purpose of the confirmation hearing".[122] The Pre-Trial Chamber emphasised the importance of having access to the evidence exchanged between the Prosecutor and the Defence with particular reference to exculpatory evidence in order to ensure that the Prosecutor has properly disclosed the evidence to the Defence and that the latter had adequate time and facilities to prepare for the confirmation hearing.[123]

In more recent cases divergent interpretations can also be observed. In *Ruto and Sang* the Single Judge of Pre-Trial Chamber II stated that ensuring an effective disclosure process "requires that all evidence disclosed between the parties, shall be communicated to the Chamber, regardless of whether the parties intend to rely on or present the said evidence at the confirmation hearing".[124]

The Prosecutor applied to the Pre-Trial Chamber seeking leave to appeal this decision. He emphasised, *inter alia*, that the departure from the "bulk rule" adopted in the *Lubanga* and *Katanga* cases affected the fairness of the proceedings vis-à-vis the Prosecutor.[125] On this issue the Single Judge of the Pre-Trial Chamber pointed out that the so-called "bulk rule" was not a term or a concept enshrined in the Court's statutory documents but rather a notion developed in some pre-trial proceedings.[126] Therefore considering the rejection of the *stare decisis* doctrine by the ICC procedural system the Pre-Trial Chamber was allowed to depart from the "bulk rule" notion.[127]

Furthermore, the Prosecutor sought leave to appeal the decision on the issue of whether the Chamber may order the Prosecution to provide the Chamber with all the material made available to the Defence which will not be used at the confirmation hearing.[128] The Prosecutor argued that by requiring the communication of all evidence the Pre-Trial Chamber was assuming control over the presentation of both parties' case intruding in their role to decide what evidence to offer at the confirmation hearing.

On this issue the Single Judge recalled that the Pre-Trial Chamber may "request the submission of all evidence that it considers necessary for its specific determination

121 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, para. 67.
122 Ibid. at para. 16.
123 Ibid. at para. 19 and 24.
124 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision Setting the Regime for Evidence Disclosure and Other relate Matters, 6 April 2011, para. 6. See also *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on Issues relating to Disclosure, 30 March 2011.
125 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the "Prosecution's Application for leave to Appeal the 'Decision setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", 2 May 2011, para. 21.
126 Ibid. at paras. 25-26.
127 Ibid. at para. 25
128 Ibid. at para. 29.

at the end of the pre-trial stage, in addition to other evidence which has been presented by the parties" in fulfilling its role to contribute to the establishment of the truth in the framework of the confirmation of charges.[129] Against this background the Single Judge dismissed the Prosecutor's argument.[130]

Two other recent decisions in the *Abu Garda* case and in the *Gbagbo* case restated that only the evidence which the parties intend to rely on at the confirmation hearing should be communicated to the Pre-Trial Chamber and even exculpatory evidence disclosed to the Defence should not be communicated if the Defence does not intend to rely on it at the confirmation hearing.[131] At the same time another Pre-Trial Chamber continues to advocate the duty to inform the Pre-Trial Chamber of all the evidence disclosed between the parties regardless of the parties' intention to use that evidence at the confirmation hearing, including exculpatory evidence disclosed pursuant Article 67(2).[132]

2.4 Prosecution disclosure obligations throughout the entire proceeding

2.4.1 Rule 76: Pre-trial disclosure relating to prosecution witnesses

As a general rule in the ICC procedure the Prosecutor is required to disclose to the Defence the names of the witnesses he intends to call to testify as well as their prior statements in the original language and in a language that the suspect fully understands.[133] The same obligation arises in relation to any additional witnesses the Prosecutor may decide to call.[134] This subsection describes the characteristics of these obligations incumbent on the Prosecutor giving account of the relevant contribution the ICC jurisprudence has made to their development.

Rule 76 reads as follows:

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

At the confirmation hearing the Prosecutor is not obliged to call witnesses who are expected to testify at trial when he considers it sufficient to rely on documents or

129 Ibid. at para. 37. See ICC Statute, Article 69(3).
130 Ibid. at para. 37.
131 See *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Second Decision on issues relating to disclosure, 15 July 2009, paras. 9-11; *Prosecutor v. Laurent Gbagbo*, Decision Establishing a disclosure System and a calendar for Disclosure, 24 January 2012, paras. 15 and 19.
132 *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision Setting the Regime for the Evidence Disclosure and Other Related Matters, 12 April 2013, paras. 8-12.
133 ICC RPE, Rule 76(1).
134 ICC RPE, Rule 76(2).

summary evidence.[135] However, even if the Prosecutor decides to rely on redacted versions of the prior statements of any witnesses without calling the witness to testify at the confirmation hearing he is still obliged to provide the Defence with the unredacted version of such statements.[136] In other words, even if Rule 76 makes reference only to "witnesses whom the Prosecutor intends to call to testify" the provision must be interpreted as covering any witness whose written or oral testimony the Prosecution intends to rely upon at the confirmation hearing.[137]

In relation to Rule 76 it is noteworthy that in the *Lubanga* case the Pre-Trial Chamber stated that the term "any prior statements" of the witnesses the Prosecutor intends to call to testify must be interpreted as including statements taken by entities other than the Prosecutor and which are not in his possession or control and consequently the Prosecutor "is under the obligation to make its utmost effort to obtain the prior statements" (taken by other entities) of those witnesses on whom he intends to rely at the confirmation hearing.[138]

As far as the timing of Rule 76 disclosure is concerned the text uses the expression "sufficiently in advance to enable the adequate preparation of the defence". Given that the Prosecution is allowed to continue his investigations until the beginning of the confirmation hearing the Pre-Trial Chamber stated that the mandatory time limit for the Prosecution to decide which evidence he intends to rely on at the hearing is no later than thirty days before the date of the hearing and fifteen days before the hearing in case of new evidence.[139]

Rule 76 allows restrictions to disclosure in order to safeguard the protection and privacy of witnesses and victims as well as the protection of confidential material under Rules 81 and 82. This exception will be analysed in a specific section dedicated to the restrictions on disclosure.

2.4.2 Rule 77: Inspection of material in possession or control of the Prosecutor

The Prosecutor has an obligation to allow the Defence to inspect certain categories of material in his possession. This subsection examines Rule 77, which regulates this type of "passive disclosure" by the Prosecutor, highlighting certain aspects of it as touched upon by the ICC Chambers' jurisprudence.

Rule 77 reads as follows:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs

135 ICC Statute, Article 61(5).
136 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 98.
137 Ibid. at para. 100.
138 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, para. 4. See Klamberg, above n. 106 at pp. 281-282.
139 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 105.

and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

The terminology and content of Rule 76 and 77 of the ICC RPE resemble ICTY Rules 66(a)(ii) and 66(B). The difference between Rule 77 and its counterpart at the ICTY is that Rule 77 does not need a request by the Defence to trigger the inspection. [140] The Prosecutor has to allow the Defence to inspect the originals of the books, documents, photographs and tangible objects in his possession or control on the OTP premises as described by the rule.[141] During or immediately after the inspection, upon request of the Defence, the Prosecutor must provide it with an electronic copy of any material subject to inspection.[142] Finally, once this procedure has been completed the Prosecutor must file in the records of the proceedings the originals and an electronic copy of those items he intends to produce at the confirmation hearing.[143]

The Prosecutor must allow the Defence to inspect books, documents, photographs and other tangible objects in his possession or control which are (i) material to the preparation of the Defence (ii) intended to be used by the Prosecutor as evidence at the confirmation hearing or at trial or (iii) were obtained from or belonged to the suspect.

In relation to the first category, the Appeals Chamber stated that Rule 77 has two stages. First, it must be determined whether the books, documents, photographs and other tangible objects in question are "material to the preparation of the defence". If they are, the second stage envisages their disclosure to the Defence subject to the restrictions on disclosure as provided for in the Statute and the Rules.[144] Therefore only once it is first determined that information is material to the preparation of the Defence can consideration be given to whether any restrictions on the right of disclosure should be imposed.[145]

The Appeals Chamber considered that "material to the preparation of the defense" ought to be interpreted as referring to all objects relevant for the preparation of the defence.[146] Even objects which are not directly connected to exonerating or incriminating evidence cannot be excluded as they might be useful for the preparation of the defence.[147] The Appeals Chamber cited an ICTY decision which

[140] *Prosecutor v. Abdallah Banda Abakaer Nourain and Sale Mohammed Jerbo Jamus*, ICC-02/05-03/09, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, para. 34.

[141] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 113.

[142] Ibid. at para. 114.

[143] Ibid. at para. 115.

[144] *Prosecutor v. Abdallah Banda Abakaer Nourain and Sale Mohammed Jerbo Jamus*, ICC-02/05-03/09, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, para. 1 and 34.

[145] Ibid. at para. 35.

[146] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 77.

[147] Ibid.

when tackling the same issue relied on the case law of U.S. federal jurisdictions stating that the "requested evidence must be significantly helpful to an understanding of important inculpatory or exculpatory evidence".[148]

Furthermore, the Trial Chamber in *Lubanga* stated that "the prosecution is to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case".[149] Information that undermines or supports the evidence, or the credibility, of the Defence's proposed witnesses falls within the scope of Rule 77 of the Rules.[150] In *Bemba* the Trial Chamber stated that "items obtained from a prosecution witness will presumptively be material to the defence's preparation for that witness' testimony and possibly for other purposes as well".[151]

The assessment of whether information is material to the preparation of the defence pursuant to Rule 77 should indeed be made on a *prima facie* basis.[152] Information that is material to the preparation of the defence may ultimately not be used as evidence at the trial or may not turn out to be relevant to it and yet the Defence is still entitled to this information based on a *prima facie* assessment.[153] In reaching this conclusion the Appeals Chamber noted that this standard is also used at the ICTY and ICTR in relation to Rule 66 (B) of their Rules of Procedure and Evidence.[154]

2.4.3 Article 67(2): Disclosure of exculpatory evidence

The disclosure duties discussed so far concern inculpatory evidence or evidence material to the Defence which reveal to the Defence the nature of the Prosecutor's case against the accused. However the Prosecutor's most important disclosure obligation concerns the exculpatory evidence in his possession. The scope of exculpatory material is different insofar as it can directly assist the Defence in the preparation of its case and consequently its disclosure is of the utmost importance. Article 67(2) of the Rome Statute regulates this type of disclosure which constitutes a continuous obligation on the Prosecutor operating throughout the entire proceedings. This subsection assesses the main features of this duty and its development through the jurisprudence of the ICC.

Article 67(2) reads as follows:

...In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control

148 Ibid. at para. 81. The Appeals Chamber also mentioned that the formulation of the ICTY Trial Chamber was cited with approval by a commentator (H. Brady) while commenting on the disclosure regime established by rule 77 of the Rules of Procedure and Evidence.

149 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the scope of the Prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, para. 16.

150 Ibid. at para. 18.

151 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011, para. 23.

152 *Prosecutor v. Abdallah Banda Abakaer Nourain and Sale Mohammed Jerbo Jamus*, ICC-02/05-03/09, AC, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, para. 42.

153 Ibid.

154 Ibid. at footnote 103.

which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

In *Lubanga* the Trial Chamber defined the notion of exculpatory evidence in the same way as it is defined in the ICTY's Rule 68 namely as *material* (and not only evidence) that shows the innocence of the accused; which mitigates the guilt of the accused; and which may affect the credibility of the Prosecution's evidence.[155] In doing so it cleared the way from any restrictive interpretation possibly arising from the different terminology used. Article 67(2) of the ICC Statute, in fact, uses the word "evidence" whereas Rule 68 of the ICTY RPE employs the word "material". The disclosure of exculpatory material must take place as soon as practicable. When compared to the ICTY obligation the disclosure of exculpatory material at the ICC appears more meaningful when read in combination to Article 54 (1)(a) which imposes a duty on the Prosecutor to investigate "incriminating and exonerating circumstances equally".

The rule is that once the Prosecution believes that the evidence "shows or tends to show the innocence of the accused" (Article 67(2) of the Statute), it is to be disclosed to the Defence, or in case of doubt put before the Court.[156] However this conclusion was found not necessarily applicable to the confirmation hearing stage due to the different (from the trial) purpose of such hearing.[157]

For instance, the Pre-Trial Chamber stated that the disclosure of information analogous to those covered by confidentiality pursuant to Article 54(3)(e)[158] enables the Defence, for the purposes of the confirmation hearing, to have a "proper overview" of the information identified as potentially exculpatory or otherwise relevant to the Defence's preparation for the hearing and to make an informed decision on whether to object to the charges or not.[159] However, the PTC acknowledged that serving analogous information still prevented the Defence for gaining access to the potentially exculpatory material covered by confidentiality and therefore even if it minimises the prejudice caused by non-disclosure it does not fully eliminate it.[160]

The last sentence of Article 67(2) states that in case of doubt about the exculpatory nature of the material in possession of the Prosecutor it is for the Court to decide. Article 67(2) must be read in combination with Rule 83, which regulates the possibility for the Prosecutor to request on an *ex parte* basis a hearing to the

155 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 59. See ICTY Rule 68.

156 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 69.

157 Ibid. at para. 70.

158 As it will be discussed below Article 54(3)(e) of the ICC Statute states, among other things, that the Prosecutor may "Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents".

159 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 79.

160 Ibid. at para. 81.

Trial Chamber for the purpose of obtaining a ruling on the exculpatory nature of the material in his possession.[161] In other words, Rule 83 underpins Article 67(2) providing for the possible intervention of the Chamber in the assessment of exculpatory material for disclosure to the Defence. However, it must be noted that this provision which states that the "Prosecutor may request" a hearing makes room for a possibility rather than establishing an obligation on the part of the Prosecutor.

The rationale behind the *ex parte* nature of the hearing regulated by Rule 83 is the focus of the hearing itself, which is to determine whether certain material should be disclosed to the Defence. The presence of the Defence at such hearing would defeat its purpose as it would prevent the Prosecutor from going into details in relation to the material at stake and at the same time the Defence would not be in the position to present any meaningful argument given its lack of knowledge of the material.[162] The Appeals Chamber made it clear, also citing the relevant jurisprudence of the ECtHR, that the Chamber must receive the material in order to deliver such a ruling.[163] In *Lubanga* the Single Judge remarked the importance of assessing the potential exculpatory value of the material by also placing it in context with other material gathered during investigation.[164]
The Defence also can request the Pre-Trial Chamber to order disclosure of exculpatory material for the purposes of the confirmation hearing.[165] The same request can be addressed to the Trial Chamber in preparation for the trial.[166]

Restrictions on the disclosure of exculpatory material are acceptable in case of (i) an agreement between the Prosecution and the Defence on those facts affected by the relevant material; or (ii) when the Prosecutor withdraws the factual allegations and/or charges affected by the relevant material.[167] For the purposes of the confirmation hearing the Appeals Chamber acknowledged that preventing the Defence from having access to certain information that has been identified as potentially exculpatory in application of Rules 81(2) and (4) does not necessarily make the confirmation hearing as a whole unfair.[168]

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161 ICC RPE, Rule 83 states that "the Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2".

162 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 2.

163 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 46. The Appeals Chamber cited, *inter alia*, the case of *Rowe and Davis v. The united Kingdom* in which, as discussed, the Grand Chamber of the ECtHR found that a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh it against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1 [right to a fair trial].

164 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 33.

165 Rule 61(3) envisages the power of the Trial Chamber to "issue orders regarding the disclosure of information for the purposes of the hearing."

166 Article 64(3)(c) states, *inter alia*, that "the Trial Chamber shall provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial." See also Brady, above n. 85 at p. 412. See also Schoun, above n. 79 at p. 277.

167 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 5. The decision cites the Trial Chamber in the Lubanga case.

168 *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, AC, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber Entitled "First Decision on the Prosecutor Request for Authorization to Redact Witness Statements", 13 May 2008, paras. 59-65.

The Appeals Chamber stressed that there is no relationship between the entitlement of the accused to the disclosure of exculpatory material and the Defence's disclosure. It stated that the lack of any correlation between the right to disclosure from the Prosecution and any disclosure obligations on the Defence is evident in that the Prosecutor is duty-bound to provide full disclosure even if an accused elects to remain silent or does not raise a defence.[169] The OTP must set up search criteria able to allow it to research constantly for potentially exculpatory material within the material in its possession regardless of the position of the Defence which plays no role in the search.[170]

Furthermore, the Appeals Chamber made clear that even material which is gathered through confidential agreements is subject to disclosure if it is of an exculpatory nature. It noted that to hold the contrary would allow the Prosecutor to withhold a potentially large amount of information without any monitoring by the Chamber and that would be incompatible with the requirements of a fair trial which is the guiding principle in the interpretation of the Statute.[171]

In relation to exculpatory evidence, a suggestion made by Schabas appears workable. He, while commenting on Article 67 and possible remedies for its breach, argued that Article 67 should be given a "hierarchically superior status within the Statute" so that when appropriate the Court may have the authority to declare provisions that conflict with Article 67 inoperative.[172]

2.5 The Defence's obligations to disclose

The Defence's disclosure obligations are limited when compared to those of the Prosecutor. This subsection discusses these obligations and assesses the provisions of Rules 78 and 79 which regulates the process for the Defence's disclosure. It further describes their implications for the purpose of the confirmation hearing and the trial as well as their development through the ICC's jurisprudence.

Rule 78 reads as follows:

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

Rule 79 reads as follows:

1. The defence shall notify the Prosecutor of its intent to:
(a) Raise the existence of an alibi, in which case the notification shall specify the place or

169 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 50.

170 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, paras. 23-24.

171 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 43.

172 Schabas W., *Article 67*, in Triffterer O., *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck – Hart – Nomos, 2nd Edition, 2008, p. 1273.

places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or (b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.
2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.
3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.
4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.

As far as the preparation for the confirmation hearing is concerned the Defence has no disclosure obligations unless it decides to present evidence. Indeed the provisions, which allow the suspect to challenge the charges, present evidence and challenge the Prosecution's evidence are "permissive rather than mandatory".[173] However, should the suspect wish to present evidence at the confirmation hearing he must provide a description of the evidence for the Pre-Trial Chamber within fifteen days from the date set for the confirmation hearing.[174] The Pre-Trial Chamber will then transmit this description to the Prosecutor. If the Defence intends to produce new evidence in response to any amended charges it must submit a new description of such evidence.

The ICC judicial framework does not consider that the timing and nature of Defence's disclosure may alter the scope of Prosecution's disclosure.[175] However, the Appeals Chamber allowed for the hypothetical situation where following an unjustifiable delayed disclosure of a line of defence the Prosecutor failing to disclose certain material would not *per se* affect the fairness of the trial.[176] In other words, while there is no direct correlation between Defence's disclosure and the entitlement of the accused/suspect to disclosure of exculpatory material the delayed or non-disclosure of a line of defence may affect the Prosecutor's understanding of what exculpatory material is in his possession and therefore lead to delayed or non-disclosure to the Defence. This scenario would not necessarily compromise the fairness of the proceedings.

According to Rule 78, the Defence is under the obligation to allow the Prosecutor to inspect any books, material, photographs or tangible objects in its possession or control which it intends to use for the purposes of the confirmation hearing or at trial. The provision of Rule 78 establishes an obligation that applies to both stages (pre-confirmation and pre-trial) of the proceedings. The Defence's obligation to permit the Prosecutor's inspection is limited to the material it intends to use for the purposes of the confirmation hearing or at trial. The Prosecutor's obligation

173 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Disclosure by the Defence, 20 March 2008, para. 27. See ICC Statute, Article 61(6).
174 ICC RPE, Rule 122(6).
175 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 53.
176 Ibid.

to allow the Defence to inspect his material is broader as it extends to material obtained from or which belonged to the suspect as well as to books, objects etc. which are relevant to the preparation of the Defence.[177]

The Rules are silent on the timing of the inspection. However, in *Katanga* and *Chui* the Trial Chamber found that the Defence must permit the Prosecutions to inspect "all the material in its possession or control which it intends to use at trial no less than two weeks prior to the scheduled commencement of the Defence case".[178] The same time frame was adopted in *Bemba*.[179] In that case the Trial Chamber also considered the scenario where in exceptional circumstances the need to use a specific item may arise after the two week deadline. The Trial Chamber stated that in that case the Defence may still disclose or permit the inspection of the item in question provided that (i) it takes place no later than seven days before its intended use; (ii) the Defence explains through a written submission the reasons why the item was disclosed later than the deadline and why it believes it should be allowed to use it; and (iii) after hearing the Prosecutor the Chamber agrees that the Defence should be allowed to use that particular item.[180]

If the Defence deems that disclosure of material covered by Rule 78 should be restricted it must address the Trial Chamber seeking authorisation no later than four weeks before the Defence commences the presentation of its evidence.[181]

Rule 79 obliges the Defence to disclose to the Prosecutor the existence of an alibi corroborated by the indication of the place the person claims to have been as well as by the names of the witnesses and any other evidence it intends to use to confirm the alibi. The Defence must also disclose, together with the names of witnesses and evidence, its intention to raise a ground for excluding criminal responsibility such as, *inter alia*, mental capacity, state of intoxication or duress.[182] According to Rule 79 (2) and Rule 80 notice of a particular defence should be given to the Prosecutor in sufficient advance of the commencement of the trial in order to enable the Prosecutor to adequately prepare for trial.[183] However, Rule 79(3) states that the failure of the Defence to provide notice of an alibi or grounds for excluding criminal responsibility shall not limit its right to raise such matters and to present evidence later.[184]

In *Lubanga* the TC stated that there are obligations found in the framework of the Rome Statute which can be imposed on the Defence in relation to disclosure which do not infringe its privilege against self-incrimination.[185] The TC emphasised,

177 ICC RPE, Rule 77.
178 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, para. 51.
179 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on Defence Disclosure and Related Issues, 24 February 2012, para. 17.
180 Ibid. at para. 18.
181 Ibid. at para. 19.
182 ICC Statute, Article 31(1).
183 ICC RPE, Rule 80 sets the procedure to be followed to raise a ground for excluding criminal responsibility stating that once notice has been given the Trial Chamber hears the parties and decides whether or not the Defence can raise a ground for excluding criminal responsibility. If it answers in the affirmative the Trial Chamber may grant to the Prosecutor an adjournment to address the matter.
184 ICC RPE, Rule 79(3).
185 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Disclosure by the Defence, 20 March 2008, para. 28.

among other things, its power to order "disclosure of any other evidence" pursuant Rule 79(4)[186] as well as its authority, under Regulation 54 of the Court, to make orders during a status conference on the production and disclosure of statements given by witnesses the accused intends to call and in general on the disclosure of evidence.[187] The term "any other evidence" must not be interpreted as limited to evidence related to an alibi or a ground to exclude criminal responsibility but as any other evidence the Chamber considers necessary.[188] This interpretation is supported by Regulation 54 of the Regulations of the Court.

It was against this background that the Trial Chamber considered the imposition put upon the accused of the obligation to reveal in advance details of the defence that will be adopted and the evidence to be presented does not necessarily infringe on his right to a fair trial.[189] The Trial Chamber must, at all times, ensure that any discretionary order it makes regarding Defence's disclosure does not affect the accused's right to a fair and impartial trial.[190]

In *Katanga* and *Chui* the TC stated that the Chamber's power to order the Defence's disclosure of "a document outlining the defences, as well as any information regarding the identification of Defence witnesses, their statements or summaries thereof" cannot be inferred from the provision of Rule 79.[191] The Trial Chamber derived its power to require the Defence to communicate the statements given by witnesses it intended to call at trial to the parties and to the Chamber from Regulation 54 of the Regulations of the Court rather than from Rule 79(4).

Rule 79 finds application predominantly before trial.[192] The Single Judge in *Lubanga* seemed to share this view as she stated that "under Rules 79 and 80 the Defence has the right not to reveal before the confirmation hearing any of the defences on which it intends to rely at trial."[193]

The Trial Chamber touched upon Defence's disclosure on more than one occasion. As far as the confirmation hearing is concerned it is noteworthy that in *Lubanga* the Single Judge ordered the Defence to file the statements of the witnesses it intends to rely on at the confirmation hearing in the records of the case as soon as practicable after the Defence's description of evidence has been filed.[194] In *Abu Garda* the Defence was ordered by the Single Judge to submit to the PTC "information as to the proposed subject matter and scope of the prospective questioning of the witness".[195] The ratio behind it is that a failure to disclose such information prevents

186 Ibid. at para. 30(b).
187 Ibid. at para. 30(c).
188 Ibid. at para. 35.
189 Ibid. at para. 31.
190 Ibid. at paras. 32-33.
191 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, para. 55.
192 Brady, above n. 85 at p.416.
193 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 118.
194 Ibid. at para. 17.
195 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Decision requesting the Defence to provide information on perspective witness, 8 October 2009.

the Chamber from properly exercising its power in relation to the relevance and admissibility of the evidence.[196]

Regarding the trial stage, if the Defence decides to rely on documents for questioning a (defence) witness it must make a list of those documents available to the Trial Chamber, the Prosecutor and the legal representatives, at least seven working days before the witness gives testimony.[197] In *Katanga* and *Chui* the TC remarked that the Defence's decision to challenge the testimony of a Prosecution witness by using evidence in the form of documents triggers an obligation to disclose those documents to the Prosecution in sufficient advance of the witness' testimony.[198]

In relation to the necessity for the Defence to submit a list of its witnesses and an estimation of the length of their questioning it is important to note that two different approaches were adopted by Trial Chamber I and II. While the former only requested the communication of the identity of the Defence's prospective witnesses after the Prosecutor has finished presenting his evidence[199], the latter and more strict of the two requested that the Defence provide the identity of its witnesses, their anticipated order of appearance as well as the length of their questioning no later than two weeks before the start of the Defence's case.[200] In *Bemba* Trial Chamber III adopted the stricter approach.[201]

Concerning the issue of the disclosure of the Defence's witness statements Trial Chamber I and II also adopted a (slightly) different approach. The TC I denied the Prosecutor's request of disclosure of formal (defense) witness statements and limited its request to the disclosure of summaries of the witness statements.[202] The TC II required the Defence to provide the statements given by witnesses it intended to call or a summary of the key elements of the testimony no later than two weeks before the beginning of the Defence's case.[203] In other words, the disclosure of full witness statements by the Defence was denied by Trial Chamber I and made possible but not mandatory by Trial Chamber II. In *Bemba* the Trial Chamber III adopted the TC II approach.[204] In this case the Trial Chamber also specified that if the Defence chose to opt for the disclosure of summaries (instead of the full witness statements) such summaries should contain, *inter alia*, basic identifying information such as the witness' name, date and place of birth and aliases as well as the issues upon which he or she is expected to testify and the relation of those

196 Ibid.

197 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on Defence Disclosure and Related Issues, 24 February 2012, para. 21(a).

198 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, para. 42.

199 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Corrigendum to "Decision on disclosure by the defence", 11 June 2008, Annex I, para. 41(d).

200 See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, p. 23, paragraph b(ii) and (iv).

201 See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on Defence Disclosure and Related Issues, 24 February 2012, para. 23.

202 Ibid. at para. 26 referring to the slightly different approaches adopted by Trial Chamber I and II on this issue.

203 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, p. 23, paragraphs b(iii).

204 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on Defence Disclosure and Related Issues, 24 February 2012, para. 28.

issues with the charges.[205]

No differences among the three Trial Chambers arise in relation to the request that the Defence submit, no later than two weeks before it starts the presentation of its evidence, a document outlining the factual and legal issues it intends to raise in the presentation of its evidence.[206] This request aims to, among other things, provide the Prosecutor "with the context in which to prepare its questioning of the Defence's witnesses increasing the efficiency of the procedures as a whole".[207]

It can be concluded that, regardless of the limited disclosure obligations placed on the Defence' shoulders by the ICC legal instruments, the proactive role played by the judicial organs may broaden their scope. However, in the light of the above it stands to reason to advocate an intervention by the Appeals Chamber in order to harmonise the different practices emerging from the jurisprudence of the Trial Chambers in relation to the disclosure of the list of the Defence's witnesses as well as disclosure of their statements.

2.6 The Role of the Pre-Trial and Trial Chamber in the disclosure process

The Pre-Trial Chamber plays an active role in regulating and monitoring the disclosure process for the purpose of preparing the confirmation hearing.[208] The Trial Chamber enjoys the same powers and authority in relation to the trial stage.[209] This subsection tries to describe the main implications of the Chambers' powers in the ICC proceedings' system of disclosure.

It is noteworthy that the PTC may also play an active role during the investigations and this action may have effects on the disclosure of evidence which will follow at a later stage of the proceedings. For instance, we have seen how the entitlement to disclosure of the material submitted to support a request for an arrest warrant was developed through the jurisprudence of the Pre-Trial Chamber. Moreover, in the course of the investigations the PTC may adopt the necessary measures to "preserve evidence that it deems would be essential for the Defence at trial" when it believes that the Prosecutor failed to do so.[210]

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the confirmation hearing.[211] Furthermore, the Rome Statute envisages the Trial Chamber as having the authority to request the production of any evidence it considers necessary for the finding of the truth.[212] It is noteworthy that in *Bemba* the Pre-Trial Chamber stated that the authority of the Court "to request

205 Ibid.
206 Ibid. at para. 32.
207 Ibid.
208 ICC Statute, Article 61(3).
209 ICC Statute, Article 64(3)(c).
210 ICC Statute, Article 56(3).
211 ICC Statute, Article 61(3).
212 ICC Statute, Article 69.

the submission of all evidence that it considers necessary for the determination of the truth" applies to different stages of the proceedings including the confirmation hearing.[213] It further clarified that the application of such power is restricted by the scope of the confirmation hearing.[214]

Once the case has been committed to trial and a Trial Chamber has been assigned the case it shall, according to Article 64(3)(c), provide for the disclosure of documents or information not previously disclosed, in sufficient advance of the commencement of the trial to enable adequate preparation for trial.[215] This provision is subject to any other provision of the Statute (e.g. restriction on disclosure). Moreover, pursuant to Article 64(6)(d) the Trial Chamber may order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.[216]

Regulation 54 of the Regulations of the Court states that in preparation for trial (at a status conference) the Trial Chamber may issue orders on, *inter alia*, "the production and disclosure of the statements of the witnesses on which the participants propose to rely" and "the disclosure of evidence".[217] Pursuant to this regulation, the Trial Chamber in *Katanga* and *Chui* ordered the Defence to provide the Prosecutor, the co-accused, the Legal Representatives of the Victims and the Chamber with, *inter alia*, "the statements of the witnesses whom it intends to call to testify, or a summary of the key elements that each witness will address during his or her testimony".[218]

The Rules of Procedure and Evidence further clarify the Chambers' involvement in the disclosure procedures, both prior to the confirmation hearing and before the trial, in different ways.

Rule 84 which is headed "disclosure of additional evidence for trial" confers the power to make any orders necessary for the disclosure of documents or information not previously disclosed and for the production of additional evidence to the Trial Chamber which it does with the aim of assisting the parties in their preparation for the trial and in order to facilitate the fair and expeditious conduct of the proceedings. Strict deadlines should characterise such orders in order to avoid delay.[219]

Some of the ICC judges have interpreted their powers as encompassing a certain degree of freedom to intervene in the managing of the disclosure procedure with the greater aim of the fairness and expeditiousness of the proceedings in mind. For instance, for the purposes of the confirmation hearing the Pre-

213 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, paras. 8-10.
214 Ibid. at para. 10.
215 ICC Statute, Article 64(3)(c).
216 ICC Statute, Article 64(6)(d).
217 Regulation 54(f) and (l) of the Regulations of the Court.
218 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, p. 23, paragraphs b(iii).
219 ICC RPE, Rule 84.

Trial Chamber instructed the Prosecutor to file the so-called "disclosure notes" (referring to exchanges under Article 67(2)) and "inspection reports" (referring to material inspected by the Defence under Rule 77) in the record of the *inter partes* exchange.[220] The aim of this filing is to assist the Registry in creating and keeping a record of the pre-trial proceedings ensuring legal certainty as to which materials have been exchanged between the parties.[221] In order to facilitate the assessment of the exculpatory material disclosed by the Defence the Prosecutor was ordered to include a concise summary of the content of each item and an explanation of the relevance (as potentially exculpatory) of such item in the "disclosure note".[222] In the same decision, establishing a disclosure system and a disclosure calendar, specific deadlines were issued by the Single Judge for the Prosecutor to comply with his disclosure obligations for the purposes of the confirmation hearing even if at the time the decision was issued the date for the confirmation hearing had not yet been set.[223]

Moreover in *Bemba*, noting that Mr. Bemba was believed to be a national of the Democratic Republic of the Congo ("DRC") and that the Prosecutor had conducted investigation into the DRC situation since June 2004, the Pre-Trial Chamber ordered the Prosecutor to inform the PTC and the Defence within five days on whether his ongoing search for potentially exculpatory materials that could fall under Article 67(2) of the Statute encompasses the DRC documents already in his possession and control.[224]

Another concrete application of the Pre-trial Chamber's important role in safeguarding the suspect's rights as well as ensuring that disclosure takes place under satisfactory conditions could be seen in the *Bemba* case where the Pre-Trial Chamber postponed the date of the confirmation hearing noting "with astonishment" that the Prosecutor had not discharged his disclosure obligations "correctly, fully and diligently".[225] Specifically, the Prosecutor's shortcomings concerned the inclusion of some additional witnesses in the description of evidence he intended to rely on at the confirmation hearing whose identity had not been disclosed to the Defence.[226]

2.7 The record of the proceedings

A peculiarity of the ICC criminal procedure is the Registry's duty to create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber. The record includes all documents and material disclosed between the

220 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, paras. 73-75.
221 Ibid. at para. 76.
222 *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, para. 24.
223 Ibid. at para. 39.
224 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, 12 November 2008, para. 16.
225 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Postponement of the Confirmation Hearing, 17 October 2008, para. 23
226 Ibid. at para. 22. The Prosecutor had filed three requests for redactions with the Pre-Trial Chamber but he had not waited for the relative decisions granting or denying such redactions.

parties and communicated to the Chamber. We have previously discussed the different interpretations which have been given to the term "all evidence" and the consequent implications for the communication to the PTC of the material exchanged between the parties. This subsection scrutinises the relevant provisions concerning the creation of a record of the pre-trial proceedings dwelling on the ambiguous formulation adopted by the Rules which do not clarify whether the Trial Chambers should have access to the pre-trial records.

Rule 121(10) – Proceedings before the confirmation hearing:

The Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule. Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the person and victims or their legal representatives...

Rule 130 – Constitution of the Trial Chamber:

When the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber.

Rule 131(2) – Record of the Proceedings transmitted by the Pre-Trial Chamber:

Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings...

Granting the Pre-Trial Chamber access to the records of the pre-trial proceedings did not give rise to heated discussions during the negotiations of the Rome Statute and all the delegations agreed that evidence disclosed *inter partes* should be disclosed to the PTC.[227] Also the common law lawyers felt at ease with this system in the light of the fact that the Pre-Trial Chamber is not called upon to decide on the merits of the case.[228] The purpose of the PTC's access to the records is to enable it to make informed decisions and to issue the necessary orders for disclosure and for the production of additional evidence.[229]
The Trial Chamber's access to the Pre-Trial records was a more problematic issue. Also controversial was whether evidence disclosed *inter partes* following the confirmation hearing should also be communicated to the Trial Chamber and therefore whether the pre-trial record should be updated following disclosure. On these issues a civil law – common law contrast became clear.[230] This is unsurprising

227 Brady, above n. 85 at p. 424.
228 Schoun, above n. 79 at p. 298.
229 See Brady, above n. 85 at p. 424.
230 Klamberg, above n. 106 at p. 318.

considering the opposite view the two legal traditions hold on these matters. The inquisitorial systems consider the Trial Chamber being informed of the case before the beginning of the trial normal. This is so in the light of the powers granted to the judges to run the trial and it would defeat their purposes if the bench had no prior knowledge of the case. On the contrary, the adversarial systems envisage the judge as an impartial umpire in a party-led trial. Such a construction would be affected if the judge would have to know details of the case before its commencement.

The contrast led to a "constructively ambiguous" result in the sense that no clear answer was given to the question. This becomes evident through the combined reading of Rules 130 and 131(2). While the former rule stipulates that the Presidency must transmit the record of the pre-trial proceedings to the Trial Chamber, Rule 131(2) states that the record (subject to the restriction concerning confidentiality and the protection of national security information) may be consulted by the Prosecutor, the Defence, the representative of States and the victims or their legal representatives (when they participate in the proceedings). It does not mention the Trial Chamber among the subjects entitled to have access to the record of the case. While this might be superfluous from a civil law perspective it is not so from common law.

In *Lubanga* the Trial Chamber considered that evidence cannot be introduced automatically into the trial process simply by virtue of having been included in the list of evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*.[231] It further stated that as a consequence the record of the pre-trial proceedings (and all the evidence admitted for that purpose) transmitted to the Trial Chamber by virtue of Rule 130 is available mainly to be used as a "tool" to help with preparation and the progress of the case. No disagreement on this position had been expressed by the parties in their submissions. In *Katanga* and *Chui* the Trial Chamber had access to the record of the pre-trial proceedings including all the evidence that was submitted during these proceedings.[232]

In the light of the above the Trial Chambers appear inclined to claim access to the records of the pre-trial proceedings in order to have some knowledge of the case to make full use of the powers that the Statute and the RPE grant to it in the managing of the trial. On the other hand, it is clear that the evidence must be submitted at trial *de novo* and the records can be useful for this purpose.

2.8 Limitations on disclosure

This subsection discusses the provisions of the ICC Statute and RPE regulating the restrictions on the disclosure of information as well as the main features of their practical application by the ICC Chambers with particular attention paid to the tension

231 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the status before the Trial Chamber of the evidence heard by the Pre- Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, para. 8.

232 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, paras. 24-25.

that exists between the interest in confidentiality and the accused's right to disclosure.

The ICC procedural framework allows restrictions on disclosure on grounds similar to the ones envisaged by the ICTY procedure, such as safeguarding ongoing investigation, ensuring the confidentiality of information and protecting the safety of witnesses. Restrictions may be applicable to disclosure which occurs before the confirmation hearing as well as to disclosure which takes place in preparation for the trial.[233] The Chambers must fully justify their decision to authorise restrictions on disclosure giving full explanation of the overall reasons underlying their decision.[234]

2.8.1 Rule 81: Restrictions on disclosure

Rule 81 sets the general process for the restrictions on disclosure and covers different cases in which such restrictions may be requested. Rule 81 makes reference to several provisions of the Statute which, for the sake of brevity, will not be addressed in depth. As for the provisions analysed so far, the ICC's jurisprudence has made a significant contribution in developing the application of the restrictions on disclosure. An account of the main principles elaborated by this jurisprudence is given in this subsection.

Rule 81 reads as follows:

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.
2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.
5. Where material or information is in the possession or control of the Prosecutor which

233 Brady, above n. 85 at p. 418.
234 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Public Redacted Version of the 'First Decision on the Prosecution's Request for Redactions' issued on 14 August 2009, 20 August 2009, para. 11.

is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

Rule 81(1) resembles Rule 70(A) of the ICTY RPE as it states that memoranda or internal documents prepared by the parties are not subject to disclosure.

Rule 81(2) which is based on Rule 66(C) of the ICTY Rules of procedure and evidence, regulates the situation where the Prosecutor is in possession of evidence which should be disclosed to the Defence but whose disclosure could compromise the effectiveness of the ongoing investigation. Where this is the case the Prosecutor may apply, on an *ex parte basis*, to the Chamber for a ruling on whether the material should be disclosed to the Defence.[235] The safeguard for the defendant is that the material or information not disclosed cannot be introduced as evidence without prior disclosure to the Defence.[236] Furthermore, the Chamber's assessment of the material whose non-disclosure is sought monitors the Prosecutor's discretion which therefore does not remain unchecked.[237]

Rule 81 (3) and (4) deals with the situations where pursuant to several Articles of the Statute (Article 54, 68, 72 and 93) steps have been taken to ensure the confidentiality of information and to protect (pursuant to Article 68) the safety of witnesses and victims. In these cases the particular information must not be disclosed if it is not in accordance with the procedure envisaged in the Statute.

As far as the protection of witnesses is concerned Article 68 of the Rome Statute stipulates that where the disclosure of evidence or information may lead to the grave endangerment of the security of a witness or his family the Prosecutor may disclose summaries of such evidence or information. However, this measure should not be exercised to the detriment of the accused's rights and the fairness and impartiality of the trial.[238] Rule 81(5) stipulates that material or information withheld pursuant Article 68(5) cannot be turned into evidence by the Prosecutor without prior disclosure to the Defence. Rule 81(6) envisages the same for the Defence, which can submit a summary of the relevant information when its disclosure may endanger the security of the witnesses or their family. The same limitation applies to the Defence as the information withheld cannot be introduced as evidence without prior disclosure to the Prosecution.[239]

235 ICC RPE, 81(2).
236 ICC RPE, Rule 81(2).
237 See Brady, above n. 85 at pp. 418-419.
238 ICC Statute, Article 68.
239 ICC RPE, Rule 81(6).

When the disclosure of confidential information may create a risk to the safety of the witness the Court must take steps to inform the witness in advance of the upcoming disclosure. The introduction of this safeguard will grant the witness the possibility to apply to the Chamber seeking to maintain confidentiality. Moreover, it will put the witnesses in the position to adopt additional security measures.[240]

The Appeals Chamber in the *Katanga* case[241] underlined that, when seeking redactions pursuant to Rule 81(4), the Prosecutor may only redact information from material and evidence that it must disclose to the Defence after obtaining authorisation from the competent Chamber.[242] It further noted that when the redaction sought would involve withholding exculpatory information, or would result in "a manifest inequality of arms, with little, if any prospect for fair proceedings" the Chamber would, no doubt, reject the application. However, the Appeals Chamber noted that this is a question of assessing the facts of an individual case rather than ruling out the possibility of redactions to protect people at risk being granted, in principle, in carefully defined circumstances".[243]

Interestingly enough, the ICC Appeals Chamber adopted a broad interpretation of the provision in question insofar as it ordered the non-disclosure of the identities of "third innocent parties" who may be endangered by the disclosure of such information. The aim of Rule 81(4) is "to secure protection of individuals at risk" and therefore the provision must be interpreted as also granting protection to persons other than the witnesses, victims and their families (explicitly mentioned in the Rule).[244] Rule 81(4) "should be read to include the words "persons at risk on account of the activities of the Court".[245] This finding was circumscribed to the confirmation hearing stage and the Appeals Chamber conceded that it might have reached a different conclusion at the trial stage. It stated that "it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial".[246] However, in *Lubanga* the Trial Chamber cited the Appeals Chamber Judgement and stated that the principles which were set therein are of high value also to proceedings before the Trial Chamber.[247]

The different stages of the proceedings can indeed confer differing weights to the competing interests (right to disclosure v. confidentiality, safeguard of ongoing investigation or witness and victims protection) in the eyes of the

240 See Brady, above n. 85 at p. 419.

241 In this decision the Appeals Chamber reversed the Trial Chamber decision which had decided not to authorise redactions for the protection of individuals other than victims, current or prospective Prosecution witnesses or sources or members of their families as well as redactions relating to the locations of interviews of witnesses and identifying information of stuff members of the Office of the Prosecutor and of the Victims and Witnesses Unit present at those interviews.

242 *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, AC, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber Entitled "First Decision on the Prosecutor Request for Authorization to Redact Witness Statements", 13 May 2008, para. 60.

243 Ibid. at para. 62.

244 Ibid. at para. 1.

245 Ibid. at paras. 55-56.

246 Ibid. at para. 68.

247 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Redacted Decision on the prosecution's application for non-disclosure of information filed on 7 May 2008, 5 May 2009, para 16. See Klamberg, above n. 106 at pp. 311-312.

judges. In other words, restrictions which may be acceptable at an early stage of the proceedings may be denied at the trial where the right of the accused to have knowledge of the relevant evidence or information is reinforced. For instance in *Abu Garda* while granting the non-disclosure to the suspect of the names of the OTP investigators the Single Judge confined the restriction to the stage of the proceedings where investigations were still underway "in regions that are facing ongoing armed conflicts".[248] At that stage the interest in controlling crime appears to have a high priority when assessing the necessity of granting restrictions on disclosure. [249]

In *Lubanga* the Appeals Chamber accepted that for the purposes of the confirmation hearing the Prosecutor may use unredacted witness statements and other documents even when the Defence has only had the redacted version of the material disclosed to it pursuant to Rule 81(2).[250] However it clarified that "non-disclosure to the person in respect of whom a confirmation hearing is held of the identity of the witnesses on whom the Prosecutor intends to rely at the confirmation hearing or portions of prior statements made by these witnesses is an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed".[251]

In assessing a request for non-disclosure of the identity of witnesses a Chamber must address several factors such as the danger that the disclosure of the identity of that person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken must not prejudice or be inconsistent with the rights of the accused and a fair and impartial trial.[252] In *Abu Garda* the Single Judge authorised the non-disclosure of the name of the OTP investigators during the investigations considering, *inter alia*, that at that stage of the proceedings, it is "the less intrusive protective measure available, and that it does not collide with the rights of the suspect to a fair trial".[253]

2.8.2 Article 54(3)(e) and Rule 82

Article 54(3)(e) and Rule 82 must be read together as they deal specifically with a complex and controversial issue; namely the restriction on the disclosure of exculpatory material gathered by the Prosecutor through confidential agreements

248 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Public Redacted Version of the 'First Decision on the Prosecution's Request for Redactions' issued on 14 August 2009, 20 August 2009, paras. 14-15.

249 See Klamberg, above n. 106 at pp. 307-308.

250 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecutor Request and Amended Requests for Redactions under Rule 81", 14 December 2006, paras. 1-2.

251 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para. 1.

252 *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, AC, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber Entitled "First Decision on the Prosecutor Request for Authorization to Redact Witness Statements", 13 May 2008, para. 67.

253 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Public Redacted Version of the 'First Decision on the Prosecution's Request for Redactions' issued on 14 August 2009, 20 August 2009, para. 14.

with a third party. This scenario puts the Prosecutor in a difficult position where he faces the tension between the duty to preserve the confidentiality of the material obtained and the obligation to disclose exculpatory material to the Defence. This subsection assesses the relevant provisions and discusses their judicial interpretation in cases where this tension jeopardises the fairness of the proceedings with particular reference to the *Lubanga* case.

Article 54(3)(e) – The Prosecutor's duties and powers with respect to investigations – reads as follows:

The Prosecutor may: (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;
Rule 82 – Restrictions on the disclosure of material and information protected under article 54(3)(e) – reads as follows:

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.
4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.
5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.

Article 54(3)(e) regulates the possibility "in highly restricted circumstances"[254] for the Prosecutor to enter into non-disclosure agreements with third parties willing to provide documents or information on a confidential basis throughout the investigation. The material must be received for the sole purpose of leading to other evidence. This provision is strikingly similar to Rule 70 (B)-(F) of the ICTY RPE.[255]

254 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 71.

255 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008 footnote 3. See also Brady, above n. 85 at p. 420.

Also the ratio underling this provision is the same of that in ICTY Rule 70, namely that the effectiveness of the Prosecutor's investigations is highly dependent on the cooperation of States who will be more inclined to assist when the information they provide remains confidential.

Rule 82 underpins Article 54(3)(e) insofar as it establishes several safeguards for the Defence and the provider of confidential material or information in relation to the use that the Prosecutor is allowed to make of such material as well as regarding the Chamber's authority *vis* à *vis* the provider and the witnesses linked to the material in question. Specifically, material or information gathered by the Prosecutor through a confidentiality agreement under Article 54(3)(e) of the Statute cannot be introduced into evidence without the previous consent of the provider and adequate disclosure to the Defence.[256] Once the confidential material or information has been introduced into evidence the Trial Chamber cannot order the production of additional evidence obtained from the provider nor summon the latter for the purpose of obtaining such additional evidence.[257] Furthermore, when Article 54(3)(e) material is turned into evidence through the testimony of a witness the Chamber cannot compel the witness to answer a question related to the confidential material or its origin if the witness declines to answer on grounds of confidentiality.[258] In other words, the provider remains the owner of the evidence given to the Prosecutor and its consent is a *condicio sine qua non* for its disclosure. The Chamber cannot order the production of evidence other than that for which consent to disclosure has been given.

The accused's right to challenge the evidence protected under Article 54(3)(e) remains "unaffected".[259] The provisions of Rule 82 are applicable *mutatis mutandis* to the Defence. However, this application must be ordered by the Chamber upon a request by the Defence.[260]

Gathering material under an Article 54(3)(e) agreement can provide the Prosecutor with material or information whose exculpatory nature triggers his duty to disclose to the Defence. However, at that point it is not for the Prosecutor to make such a decision as it is the provider who has the last word in relation to disclosure. The tension between the confidentiality agreements and the Prosecutor's obligation to disclose exculpatory material in his possession is striking. The Prosecution indeed faces uncertainty as to whether the provider will give the requested consent whenever it has a document pursuant to article 54(3)(e) of the Statute.[261]

In sum, "by accepting material on the condition of confidentiality, the Prosecutor potentially puts himself in a position where he either does not disclose material

256 ICC RPE, Rule 81(1).
257 ICC RPE, Rule 82(2).
258 ICC RPE, Rule 82(3).
259 ICC RPE, Rule 82(4).
260 ICC RPE, Rule 82(5).
261 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 35.

that he normally would have to disclose or breaches a confidentiality agreement entered into with the provider of the material in question".[262] Moreover, an agreement concluded under Article 54(3)(e) with a provider of information can put the Prosecutor in a difficult position *vis* à *vis* the Chamber when the provider declines to give its consent to the disclosure of relevant material to the Chamber intending assess the exculpatory nature of such material.

In *Lubanga*, the Prosecutor made extensive use of confidential agreements to gather evidence during the investigation. As a result, the Prosecution had a significant number of documents of an exculpatory nature (or material to the Defence preparation) in its possession, which it was unable to disclose to either the Defence or the Chamber. The Trial Chamber found that the Prosecutor had routintely utilised the provision of Article 54(3)(e) in order to obtain a "wide range of material under the cloak of confidentiality" for the purpose of identifying evidence that could be used at trial after having secured the provider's consent.[263] The TC remarked that this was the "exact opposite of the proper use of the provision" and amounted to a "wholesale and serious abuse". [264]

Article 18(3) of the agreement concluded by the Prosecutor with the United Nations (one of the providers) stipulated that the Prosecutor was prevented from disclosing material or information obtained under Article 54(3)(e) to the Defence as well as to "other organs of the Court or to third parties, at any stage of the proceedings or thereafter without the consent of the United Nations".[265]

The TC remarked that if the Prosecutor is unable to disclose exculpatory evidence covered by a confidentiality agreement the issue should always be raised with the Chamber.[266] It is indeed for the Chamber and not for the Prosecutor to decide upon the impact of potentially exculpatory evidence on the Chamber's determination of the guilt or innocence of the accused.[267] The Trial Chamber concluded that the trial process had been "ruptured to such a degree" that it was "impossible to piece together the constituent elements of a fair trial".[268] It therefore ordered, with great reluctance, a stay in the proceedings which was later confirmed by the Appeals Chamber.[269] The stay was eventually lifted by the TC on 18 November 2008 after it had been afforded unrestricted access to the documentation covered by Article 54(3)(e).[270] The trial commenced on 26 January 2009.

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262 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 43.

263 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 73.

264 Ibid. at paras. 72-73.

265 Ibid. at para. 65.

266 Ibid. at para. 76.

267 Ibid. at para. 87.

268 Ibid. at para. 93.

269 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008.

270 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Reasons for Oral Decision lifting the Stay of Proceedings, 26 January 2009, para. 33.

Similarly, albeit in relation to pre-confirmation hearing disclosure, the Single Judge in *Katanga* was highly perturbed by, *inter alia*, "the Prosecution's underestimation of the serious problems posed by its reckless practice of extensively gathering documents pursuant to article 54(3)(e) of the Statute during the first two years of the investigation" as well as by the Prosecutor's disregard of the deadlines for the disclosure of exculpatory evidence under Article 67(2) of the Statute.[271] However, the Single Judge considered that the prejudice caused by the Prosecutor's late disclosure had been cured by granting the Defence sufficient time to review the newly disclosed documents and to decide whether or not they wished to rely on them for the purposes of the confirmation hearing.[272]

In relation to material obtained by the Prosecutor through Article 54(3)(e) agreements the Chamber's authority is limited as it cannot order the production of such material without the provider's consent. If the consent is not given the Chamber must ask itself the question of whether the accused's rights and the fairness of the trial can be preserved through the adoption of a counter-balancing measure and in that case it must identify the appropriate one. In *Lubanga,* the TC answered the question in the negative whereas in *Katanga and Chui* the PTC found that additional time was able to remedy the prejudice caused to the Defence by the Prosecutor's untimely disclosure. The Appeals Chamber stated that, especially in circumstances where only a small number of documents are concerned, appropriate counter-balancing measures may include identifying new similar exculpatory material, providing the material in summarised form, stipulating the relevant facts, or amending or withdrawing the charges.[273]

At the basis of these two cases there was the Prosecutor's extensive and distorted use of the confidentiality agreement regulated by Article 54(3)(e) for the purpose of gathering direct evidence rather than lead evidence. This is certainly true. However, even when the provision in question is interpreted and used correctly by the Prosecutor frictions between the rights of the Defence to disclosure of potentially exculpatory material and the interest of the provider in confidentiality may arise as also lead evidence can be exculpatory in nature and therefore subject to disclosure to the Defence.

2.9 Remedies and sanctions for disclosure violations

This subsection attempts to assess the possible responses to violations of disclosure obligations envisaged by the ICC criminal procedure. It shows how the adoption of such responses rather than being codified has been left to the discretion of the Chambers whose role is crucial in relation to this issue. Particular attention is

271 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the 19 June 2008 Prosecution Information and other Matters concerning Articles 54 (3)(e) and 67 (2) of the Statute and rule 77 of the Rules, 25 June 2008, para. 21.

272 Ibid. at p. 15.

273 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, paragraphs 28 and 44.

devoted to a stay of in proceedings as a possible remedy and its operation in the jurisprudence of the Court.

Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights.[274] The Appeals Chamber stated that every aspect of human rights underpins the Statute. It stands to reason that disclosure as part of the right to a fair trial, which is one of the most prominent human rights, must be respected in the interpretation and application of the Statute of the ICC. When the fairness of the trial is affected a remedy must be taken. The appropriateness of the remedy depends on the level to which the right to a fair trial is affected.
The ICC's judicial system does not explicitly provide for remedies or sanctions for non-disclosure. Only Rule 122(8), in relation to disclosure in preparation for the confirmation hearing, stipulates that the Pre-Trial Chamber does not take charges and evidence presented after the time limit has expired into consideration.[275] Article 69(7)(b) of the Rome Statute provides the Court with the power to exclude evidence obtained in violation of internationally recognised human rights standards. According to Article 71 of the ICC Statute, the Court may sanction persons acting before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions.[276] However, such provisions may not be sufficient or appropriate to tackle all kinds of infringements of, *inter alia*, the obligation to disclose exculpatory material under Article 67 of the Statute or more in general of the rights of the accused found therein.[277]

As discussed the necessity of a remedy or a counter-balancing measure may arise as a consequence of the Prosecutor being unable to disclose documents or information to the Defence, obtained on a confidential basis under Article 54(3)(e), which are potentially exculpatory or relevant to the Defence's preparations. In this context it is noted that neither the Rome Statute nor the Rules of Procedure and Evidence provides for a "stay of proceedings" before the Court. However, the ICC derived this possibility from its inherent powers. The Appeals Chamber stressed that "where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped".[278]

Moreover, "where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making

274 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 37.
275 ICC RPE, Rule 121(8).
276 ICC Statute, Article 71.
277 Schabas, above n. 172 at p. 1273.
278 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 37.

it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice".[279]

However, before resorting to the drastic remedy of a stay in proceedings a Trial Chamber must first use tools within the trial process itself, to cure underlying obstacles to a fair trial and to allow the trial to proceed speedily to a conclusion on its merits.[280] Only when the Chamber considers that a fair trial has become irreparably impossible is the resort to a stay in proceedings appropriate. In reaching this conclusion the Chamber enjoys a certain margin of appreciation based on its "intimate understanding of the process".[281] The Appeals Chamber noted that the stay of the proceedings is the necessary remedy only if (i) the "essential preconditions of a fair trial are missing" and (ii) there is "no sufficient indication that this will be resolved during the trial process".[282] When the unfairness of a trial is of such a nature that the trial will become impossible to conduct fairly at a later stage (because of a change in the situation that led to the stay in proceedings) a conditional stay in the proceedings may be imposed as it can be lifted should the reasons for its imposition cease to exist.[283]

In the *Lubanga* case the Prosecutor had admitted in open court that confidential agreements with third parties had been used to gather the majority of the evidence to back up his case rather than using these agreements for the sole purpose of generating new evidence. He was therefore in the problematic position of being unable to disclose potentially exculpatory material to the Defence nor to the Chamber. The Trial Chamber concluded that there was no prospect of a fair trial and ordered a stay in the proceedings.

Upon appeal the Appeals Chamber noted that the TC, before ordering a stay in the proceedings, had explored options, which had not been successful such as ordering the submission of summaries or providing an undertaking that it would not disclose the material without the consent of the providers.[284] The Appeals Chamber, which confirmed the stay in proceedings, noted that if the trial had taken place despite the Prosecution's non-disclosure "there would always have been a lurking doubt as to whether the disclosure of the documents in question would have changed the course of the trial".[285]

279 Ibid. at para. 39.
280 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, para. 55.
281 Ibid. at para. 84.
282 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 76.
283 Ibid. at para. 80.
284 Ibid. at para. 98.
285 Ibid. at para. 97.

Another remedy was considered in *Banda and Jerbo* where the Trial Chamber was provided with documents and information obtained by the Prosecution pursuant to Article 54(3)(e) which were potentially exculpatory and relevant to the Defence's preparations. In relation to confidential documents which the Chamber found relevant for the Defence's preparation it considered that the Prosecutor's admissions of fact, together with the summaries and the alternative evidence were sufficient counter-balancing measures in the sense that they ensured that the rights of the accused persons were protected at this stage of the proceedings. The Trial Chamber stated that after reviewing these documents it believed that, taken together, they captured the essence of the original documents and offered a sufficient counterbalance to non-disclosure.[286]

The Trial Chamber also assessed two undisclosed and potentially exculpatory documents (whose content was not made public) and found that the admission of facts proposed by the Prosecutor along with the alternative evidence represented a sufficient counterbalance. The concession was sufficiently broad in scope and, together with the alternative evidence, covered the essential elements contained in the confidential documents. The Trial Chamber emphasised that the Defence should be able to rely on this admission from the Prosecution rather than having to seek to establish the facts through the unavailable material.[287] In this case the Defence is put in a more favourable position regarding evidence than it otherwise would have been even though the admission is not binding on the Chamber.

3. Critical aspects of the ICC disclosure process

3.1 The role of the Prosecutor and his disclosure obligations

We have discussed in the previous chapter that the ICTY Prosecutor is a *sui generis* figure expected to prosecute in an adversarial context as well as acting as a *super partes* entity of inquisitorial origin at the same time. We have also seen that the Prosecutor appears to struggle to reconcile these two characteristics "assumed to be achievable"[288] and that the disclosure of information is one of the ambits in which such difficulties appear more evident.

The analysis of the role of the Prosecutor in the ICC legal system showed certain differences with his ICTY counterpart. The most relevant and welcome of these differences is that pursuant to Article 54(1)(a) of the Rome Statute the Prosecutor is statute bound to investigate incriminating and exonerating circumstances equally. This provision marks a significant change in the characterisation of the role of the Prosecutor and brings it closer to the inquisitorial legal tradition of an investigating judge. Moreover, this provision reinforces and grants authority to the concept of a

286 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Public Redacted Version of the "Third Decision on Article 54(3)(e) Documents, 21 June 2013, paras. 14-15.

287 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Public with Confidential ex parte Prosecution Only Annex A Public redacted version of the "Second Decision on Article 54(3)(e) documents, 26 October 2012, paras. 18-19.

288 McIntyre G., *Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, Leiden Journal of International Law, 16 (2003), p. 282.

super partes Prosecutor acting as a Minister of Justice in the investigation stage. The ICTY's jurisprudence developed this understanding of the Prosecutor making the role more inquisitorial than its adversarial beginnings. This course of action made it difficult for the Prosecutor to find the right balance.

The ICC Prosecutor knew from the beginning that his role in the investigation was conceived as impartial and that he is required to assess a particular situation with the goal of discovering the truth rather than building up his case. This duty has implications in relation to the disclosure to the Defence. As noted by one commentator, the ICC Prosecutor is under the double obligation to investigate exculpatory material and to disclose it as soon as possible whereas at the ICTY he is subject only to the second.[289]

The Defence will benefit from the Prosecutor's obligation to investigate exculpatory circumstances as it reinforces the meaning of Article 67(2) according to which the Prosecutor has to discover exculpatory material in his possession as soon as possible. There is a difference indeed between coming across exculpatory material during investigations whose aim is to mount a case against the suspect and being compelled to investigate these circumstances with the aim of discovering the truth.

As far as the Prosecutor's disclosure obligations are concerned they appear to be similar to those envisaged by the ICTY system. The major difference is given by the existence of two stages of disclosure in the ICC framework. The two stage structure originates from the establishment of a hearing to confirm the charges in which the Defence is allowed to participate and introduce evidence.

We have discussed that the provisions regulating the disclosure process prior to the confirmation hearing have been interpreted differently by different Pre-Trial Chambers (bulk rule v. totality rule) and that such difference originates not only from a different reading of the provision but more profoundly from a different conception of the role of the PTC. This dichotomy calls for an intervention of the Appeals Chamber which should indicate the correct interpretation to be applied in all cases.

On this point it is suggested that a difference should be drawn between inculpatory and exculpatory evidence for the purpose of disclosure and communication before the confirmation hearing. From the research conducted it appears that the difference in scope of the hearing to confirm the charges and the trial is clear as the former prevents unmeritorious cases from going to trial and the latter assesses the guilt or innocence of the accused. Consequently, it stands to reason to accept that there may also be a difference in the scope of the disclosure that takes place for the purposes of these two phases. It is also reasonable to limit the disclosure of inculpatory information as well as their communication to the PTC to those materials which the parties intend to rely on at the confirmation hearing. The

289 Caianiello, above n. 1 at p. 28.

alternative option (full disclosure and communication) would transform the hearing into a "mini trial" which was not the drafters' intention.

However, the conclusion is different in relation to the disclosure of exculpatory material. That is a continuous obligation that should take place "as soon as possible" regardless of the stage of the proceedings. The reading of Article 121(1) confirms this interpretation as it stipulates that a person subject to an arrest warrant or a summons to appear enjoys the rights envisaged by Article 67. Moreover, it is submitted that for the purposes of the confirmation hearing exculpatory material should be communicated to the Pre-Trial Chamber regardless of the parties' intention to use it at the hearing. This approach would not go against the scope of the hearing as exculpatory material can only assist in the filtering function of this stage.

Given these considerations it appears questionable to exclude this form of evidence from that which needs to be communicated to the PTC unless the parties intend to use it at the hearing.[290] In *Gbagbo* the Single Judge considered that this approach is consistent with the limited scope of the confirmation hearing which is to assess whether there is sufficient evidence establishing substantial grounds to believe that the person committed each of the crimes charged. However, it is noted that exculpatory evidence can affect the strength of the Prosecutor's charges and therefore its disclosure and communication remains within the limit of the confirmation hearing as it can counter the evidence produced by the Prosecutor to establish the "sufficient grounds".

On this issue, the alternative view advocating the communication of all exculpatory evidence to the PTC prior to the confirmation hearing appears more convincing. Depriving the Pre-Trial Chamber of the possibility to see a piece of crucial exculpatory material could result in sending (and imprisoning) an innocent individual to trial.[291]

Even if exculpatory evidence is communicated to the PTC the latter must base its decision on the material presented at the hearing. Therefore, the communication would put the Chamber in the position of assessing the material and order its production pursuant to Article 69 (3) only when it considers it necessary. In other words, it would allow the PTC to fully exercise its role as an arbiter of the exculpatory or incriminating nature of a piece of evidence as well as its function of filtering the Prosecutor's cases and safeguarding the rights of the suspects.

Summing up, it can be concluded that limiting the disclosure of incriminating material to the Defence and its communication to the PTC to the material which the Prosecutor intends to use at the confirmation hearing appears consistent with the particular purpose of that hearing. The same conclusion cannot be reached in

290 See for instance *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, para. 19.

291 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Second Decision on issues relating to disclosure, 15 July 2009. Partly Dissenting Opinion of Judge Cuno Tarfusser, para. 11.

relation to exculpatory material whose disclosure prior the confirmation hearing appears to be in line with the scope of such a hearing and necessary to safeguard the rights of the suspect as well as to allow the PTC to effectively carry out its function.

3.2 Non-disclosure of exculpatory material obtained under Article 54(3)(e)

The combined reading of Article 67(2) and Rule 83 establishes a clear rule according to which the first assessment of the nature of the material in his possession is the responsibility of the Prosecutor who in case of doubt may turn to the Chambers for a ruling. It is noteworthy that this rule also applies to exculpatory material protected by confidentiality agreements under Article 54(3)(e). Even in relation to such material it is for the Chamber rather than the Prosecutor to assess whether the accused's rights and the fairness of the trial can be preserved through the adoption of a counter-balancing measure where there has not been disclosure.
Confidential agreements are essential for the effectiveness of the investigations. It is also self-evident that without the Prosecutor's commitment to non-disclosure to the Defence the purpose of the provision of Article 54(3)(e) would be defeated. In *Lubanga*, asides from the misuse of this provision, the problem was caused by the Prosecution undertaking not to disclose the confidential material to "other organs of the Court" as well. While an agreement under Article 54(3)(e) not to disclose material obtained by a third party provider to the Defence is understandable as it lays at the basis of the provision itself, accepting the obligation to not disclose that material to the Chambers is problematic.

Given that the Prosecutor may not be in the position to know the exact nature of the material which the provider will serve on him in advance[292], when negotiating an agreement under Article 54(3)(e) he should make sure that it contemplates the possibility for the Prosecutor to provide exculpatory material to the Chamber for its assessment under Rule 83. This clause would not defeat the purpose of the agreement as the providers' interest in non-disclosure would be met by the Chamber's inability[293] to force the disclosure of the confidential material which would, therefore, remain unaffected. Moreover, the professionalism and discretion of the ICC judges, who would be bound not to reveal any information about the material received, should in itself a sufficient guarantee as to the maintenance of confidentiality of the material in question.[294]

The ICC Appeals Chamber stated that whenever the Prosecutor relies on article 54(3)(e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential

292 In *Lubanga* the Prosecutor, when he agreed to receive the material on confidential basis from the UN, appeared to have been aware that the material could contain exculpatory information and relied on the expectation (ungrounded) that the providers would at a later stage agree to its disclosure. See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 44.

293 Envisaged by Rule 82.

294 However it is noted that in *Lubanga* the UN did not change their position after the TC gave an undertaking that it would not disclose the material without the consent of the providers.

tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.[295] Furthermore, the Appeals Chamber was concerned that the Prosecutor agreed that he would not disclose the material even to the Chambers of the Court without the consent of those who provide the information.[296] It mentioned the possibility of other arrangements between the Prosecutor and the UN although it did not give any example.[297] When material is offered to the Prosecutor on a confidential basis he must consider its expected content and nature and its relevance for the Defence. Against this background he will have to assess under what exact conditions he may accept the material in question particularly bearing in mind his obligation to disclose potentially exculpatory material under Article 67(2).[298]

Interestingly, in *Banda and Jerbo* the Trial Chamber was presented with the documents obtained by the Prosecutor pursuant to Article 54(3)(e) and was able assess them and identify the appropriate counter balancing measures to be adopted in order to safeguard the accused's right to a fair trial.[299] Here the Chamber's access to the confidential documents ensured the possibility of finding appropriate solutions to guarantee the accused's right to a fair trial even when confronted with non-disclosure of potentially exculpatory material. The Trial Chamber kept monitoring the situation and was able to single out the counter-balancing measures that enabled the trial to continue. The absence of such judicial supervision might have led to the imposition of a stay in proceedings, which was indeed the measure sought by the Defence.

These cases seem to go in the direction proposed, namely towards the necessity of the involvement of the Chambers in the assessment of Article 54(3)(e) material. This result can only be achieved if the Prosecution's obligation of non-disclosure (as a result of an agreement of confidence between the OTP and a provider of information) is not extended to the Chambers.

3.3 Defence's disclosure

The analysis carried out showed some improvements (in comparison to the ICTY) in the Defence's position in relation to disclosure. For instance, in relation to the timing of the disclosure that the Defence receives from the Prosecution, the Defence whilst not having any disclosure obligations itself (unless it intends to present evidence) benefits from extensive disclosure from the Prosecutor as a result

295 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 44.

296 Ibid. at para. 45.

297 The Appeals Chamber noted that the wording of the relevant part of the OTP-UN agreement stated that the Prosecutor "may agree" that the documents provided shall not be disclosed to other organs of the Court and therefore it left room for other arrangements between the Prosecutor and the UN. See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 51.

298 Ibid. at para. 51.

299 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Decision on the defence request for a temporary stay of the proceedings, 26 October 2012.

of the creation of the confirmation hearing. This in turn allows the Defence to have a clearer picture of the Prosecutor's case at an earlier stage. Moreover, we have discussed the Pre-Trial Chamber's monitoring function and specifically its power to step in should the Prosecutor miss a unique investigative opportunity capable of providing evidence relevant to the Defence's case.

However, due to the similar nature of the provisions regulating the Defence's disclosure in the ICC and in ICTY proceedings some of the concerns voiced in the former chapter also find application in relation to the ICC. For instance, in relation to the high threshold that the Defence appears to have to meet in order to be granted the disclosure of additional evidence by the Chambers. The reader is therefore redirected to the previous chapter for discussion on this issue.
It is noteworthy that in the ICC's judicial system the scope of the Defence's disclosure both prior to the confirmation hearing and prior to the trial can be significantly broadened by intervention from the Chambers. We have seen that the Chambers have been willing to intervene in the Defence's disclosure even beyond the limited obligations envisaged in order to facilitate the disclosure process and therefore expedite the trial. In decisions concerning Defence disclosure it is common for the TC to make reference to Rule 79(4) granting the Chambers the power to order the Defence to disclose any other evidence as well as to Regulation 54 of the Court empowering the Chambers to order the Defence to, amongst other things disclose the statements of the witnesses the accused intends to call.

The crucial issue is finding the right balance between the interest in the expeditious management of the case and the Defence's rights. We have seen that the Appeals Chamber, whilst acknowledging the accused's privilege against self-incrimination and right to remain silent, explained that there are disclosure obligations that can be imposed on the Defence without infringing the accused's rights to a fair trial. At all times the Chamber has an absolute duty to ensure that any discretionary order it makes regarding the Defence's disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.

While the imposition of further disclosure obligations may not infringe the suspect/accused's right to a fair trial it is contended that the Chambers should use their power carefully. For instance, when anticipated disclosure of the Defence's strategy is likely to assist the Prosecutor in disclosing further exculpatory evidence. Other considerations such as the expeditiousness of the trial should not outweigh the suspect/accused's rights. A different approach to the issue would risk reducing the difference in scope between the Prosecutor and the Defence's disclosure which was intentionally established by the drafters as a tool to enhance the principle of the equality of arms otherwise affected by the structural imbalance existing between them.

3.4 The role of the Pre-Trial Chamber in the disclosure process

The creation of the Pre-Trial Chambers is an interesting feature of the ICC legal system which has significant implications for the disclosure process. The ICC

seems to have learned from the ICTY insofar as its legal framework envisages a more active and earlier involvement from the judiciary in the organisation of the disclosure process. We have seen that the judicial management of the trial was found to be a necessary part of the procedure at the ICTY following its first few years of activity and it was achieved through significant amendments of the RPE. In this context we have discussed, *inter alia*, the pre-trial judge's authority to adopt a "work plan" stating the obligations the parties are required to meet in the pre-trial stage and their respective deadlines.

In the ICC's judicial system it is the responsibility of the Pre-Trial Chamber to ensure that disclosure takes place under satisfactory conditions.[300] To this aim the PTC has the power to establish a system that regulates the disclosure of evidence between the parties (and its communication to the Chamber) and a calendar for disclosure for the purposes of the confirmation hearing. The resemblance to the ICTY's Single Judge "work plan" is evident.

Furthermore, the Pre-Trial Chamber's involvement in the investigation stage appears to be a positive development for the safeguarding of the suspect's rights and for disclosure to the Defence. The supervisory function regarding the Prosecutor's discretion in assessing the exculpatory nature of the material in his possession is also welcome. However, the fact that the Chambers can exercise their powers only upon the initiative of the parties which therefore limits the effectiveness of their powers cannot be overlooked. Indeed, it is for the Prosecutor to request the hearing under Rule 83 and have a Chamber ruling on the exculpatory nature of particular material and his function appears immune from scrutiny.[301]

Moreover, the Pre-Trial Chamber's ability to intervene in the investigation in order to safeguard the rights of the suspect is also welcome. The possibility to take its own investigative initiative when the Pre-Trial Chamber considers that the Prosecutor has failed to secure a unique investigative opportunity to gather evidence favourable to the Defence provides an additional safeguard for the suspect.[302] However, in order to appreciate the uniqueness of an investigative opportunity the Chamber must be involved and aware of the development of the investigation.

3.5 The lack of a system of procedural sanctions

Neither the Rome Statute nor the RPE foresee any sanction in case of violations of the disclosure obligations by one of the parties. An exception is made for the exclusion of evidence disclosed too late to prepare for the confirmation hearing pursuant to Rule 121(8). The same issues expressed on this topic in relation to the ICTY are therefore applicable to the ICC insofar as the lack of a statutory provision giving certainty for the sanctions which can follow to non-disclosure or delayed disclosure appears to be questionable.[303]

300 ICC RPE, Rule 121(2).
301 Caianiello, above n. 1 at p. 30.
302 ICC Statute, Article 56, para. 3.
303 See chapter six.

As for the ICTY, the ICC legal framework also leaves the choice of appropriate sanctions with regard to the specific violation to the judges on a case-by-case basis. Nevertheless a difference with the ICTY seems to emerge concerning the approach followed by the judges towards the imposition of sanctions, when considering the response of the Chamber in *Lubanga* to the Prosecutor's decision not to disclose large numbers of exculpatory material gathered through confidential agreements. On that occasion the Trial Chamber was not afraid to take recourse to the drastic measure of ordering a stay in the proceedings when it reached the conclusion that the trial process had been "ruptured to such a degree" that it was "impossible to piece together the constituent elements of a fair trial".[304] While this is a major step, the difference with the ICTY is not so clear when we consider that the TC imposed a provisional stay in the proceedings that was lifted once the Prosecutor had complied with his disclosure obligations.[305] The Trial Chamber did not order the proceedings to be discontinued. The measure adopted therefore seems to aim towards offering the Prosecutor the possibility of ensuring the trial is fair again rather than sanction the Prosecutor for his grave misconduct.[306] This approach resembles the ICTY's preference for a remedial rather than a sanctioning approach.

On the one hand, it is understandable that the judges decided to leave room for redressing the situation with the aim of reaching a verdict and the Trial Chamber's approach was brave considering the interests at stake. However, it is noted that the imposition of a provisional stay came at the cost of legal certainty throughout the procedure and (paradoxically) for the rights of the accused. In relation to the former the provisional stay rather than the unconditional discontinuance did not send out the message that there can be disclosure violations capable of affecting the fairness of the trial so seriously as to render its continuation impossible. As for the rights of the accused, the problem with a provisional stay without a deadline for its possible lifting can be better explained through a question: what if in *Lubanga* the Prosecutor had disclosed the exculpatory material after two or three years rather than two or three weeks from the imposition of the stay of the proceedings? A deadline for the Prosecutor could have been a more convincing solution for the matter.

4. Concluding remarks

The analysis carried out shows that the ICC legal system established through the adoption of the Rome Statute and the Rules of Procedure and Evidence has been given significant inquisitorial elements. However, these elements operate in a context that maintains the features of the common law tradition such as the trial hearing where the parties present their cases and, more importantly, the disclosure of information that is regulated by an articulated set of technical rules. The interaction between comprehensive regulation of the disclosure process and

304 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 93.
305 Ibid. at para. 94.
306 Caianiello, above n. 1 at 23-42.

the more inquisitorial role played by the actors who operate in the a process is an interesting one.

The ICC legal framework grants a position of control to the judiciary and enables intervention in the proceedings at both the pre-trial and trial stage. The creation of Pre-Trial Chambers, which are reminiscent of an Italian *giudice per le indagini preliminari,* is an interesting feature. The PTC's monitoring function over the Prosecutor as well as its power to ensure that disclosure takes place under satisfactory conditions in preparation for the confirmation hearing reveals an inquisitorial flavour. Emblematic of this direction is the emphasis placed on the Chamber as the organ designated as having the final word on the exculpatory nature of the material in the Prosecutor's possession. The codified *super partes* role the Prosecutor plays during the investigation is welcome when contrasted with the developments of his ICTY counterpart.

These characteristics may question the necessity of a complex and articulated set of rules regulating disclosure. One may wonder whether several of the ICC features could not be developed so as to lead to a more efficient and simplified disclosure process. For instance, the idea of disclosure taking place to a greater extent before a Chamber which is not involved in the determination of the guilt or innocence of the accused (as well as at an earlier stage) in addition to the judicial supervision over the investigation process and the disclosure of the material gathered deserves praise and could be developed further. In this sense, the confirmation hearing is an intriguing novelty with significant potential in relation to the disclosure of information. Moreover, the creation of the record of the pre-trial proceedings is another noteworthy innovation, which seems to be moving in the direction of a more open and simplified disclosure process.

These considerations call for further discussion that will be developed in the context of the final chapter of this book.

VIII. Conclusion

1. What are the goals of criminal proceedings?

Any society, national or international, needs to guarantee the security and well being of its constituency. Each member must be deterred from and punished for perpetrating acts which may negatively affect others and ultimately threaten the social order. Criminal justice and criminal proceedings are the instruments used to address these needs.

What are the goals of criminal proceedings? In my view, going beyond the terminology employed by different legal traditions, the common purpose of criminal proceedings is to ascertain the guilt or innocence of an individual accused of a crime ensuring that he receives a fair and impartial evaluation of the situation.

However, the comparative analysis carried out shows that this common goal is pursued in different manners by different criminal systems. For instance, at the national level the English criminal procedure embraces an adversarial approach where the guilt or innocence of the accused emerges from a contest between the prosecutor and the defence before a passive judge. On the other hand, the French procedural system presents an inquisitorial approach to the discovery of the truth that is a prerogative of the institutions and cannot be left entirely in the hands of the parties.

A democratic society must act firmly against those who have committed a crime but it is equally important that it shows that its criminal law system guarantees their fundamental rights. Indeed "society wins not only when the guilty are convicted but when criminal trials are fair".[1] Therefore criminal proceedings must defend the rights of the accused against possible abuses.
This consideration leads to the primary role in criminal proceedings being played by human rights norms regarding the fair trial. Domestic criminal systems must abide by a set of norms, envisaged by different international legal instruments, which grant the suspect and the defendant several rights in criminal proceedings.

The domestic criminal procedures of England, Italy and France must be in line with the standards set out by the European Convention on Human Rights as applied and developed by the jurisprudence of the European Court of Human Rights. The jurisprudence of the Strasbourg Court contributes to the harmonisation of the criminal procedures of the Member States of the Council of Europe, promoting and defending a set of core fair trial rights that cannot be disregarded in any criminal system. The international procedural systems of the ICTY and the ICC, although not directly subject to international human rights instruments, envisage in their Statutes the right to a fair trial.[2]

1 US Supreme Court, *Brady v. Maryland* 373 US 83 (1963), para. 87.
2 See Article 20(1) of the ICTY Statute and Article 64(2) of the ICC Statute.

Another important feature of criminal proceedings is that they must be conducted and concluded in reasonable time in order to be effective. The right to be tried expeditiously is enshrined in the European Convention on Human Rights. The excessive length of criminal proceedings generates uncertainty and frustration for those who are being prosecuted and reveals problems, some of which are structural, in the administration of justice.

It can be concluded that the assessment of the effectiveness of a criminal law system's response to crime cannot be limited to the numbers of convictions reached but it must extend to the fairness and expeditiousness of the proceedings that led to such convictions.

Fair trial rights and criminal procedure are intertwined. Criminal procedure sets the rules to be followed, weighing the rights of suspects and defendants. It is through criminal procedure that crime control and human rights are reconciled in order to find a fair balance. Crime control and human rights should not conflict as their interaction benefits the entire system showing its capacity to bring those who violated its criminal law to justice yet ensuring them a fair assessment of their conduct.

2. How does disclosure relate to these goals?

"He who knows only his side of the case knows little of that".[3] This quote encapsulates the meaning and importance of disclosure in criminal proceedings. Disclosure is the act or process of revealing or uncovering; it brings to light what could not be seen before.
The disclosure process in criminal proceedings is a fundamental tool for the defendant as it assists him in gaining knowledge of the case against him.
The European Court of Human Rights made it clear that "it is a requirement of fairness...that the prosecution authorities disclose to the defence all material evidence for or against the accused".[4] This is an essential rule, which clarifies the solid nexus between the fairness of proceedings and the disclosure of information. Disclosure goes to the heart of the fairness of criminal proceedings which cannot be achieved in its absence.

Disclosure is also the practical manifestation of the principle of the equality of arms. The prosecutor, who enjoys more investigative resources, is compelled to disclose information and material relevant to the defence case. Without the prosecutor's disclosure the defence would have no access to certain material. Disclosure obligations reduce the structural gap that exists between the two parties.

Disclosure is now considered an essential feature of criminal proceedings. However

3 Notable quotation from John Stuart Mill.
4 *Edwards v. The United Kingdom*, ECHR, no. 13071/87, 16 December 1992, para. 36.

the comparative analysis reveals that this is the outcome of a development which in certain cases started from the opposite perspective.

For instance, in England in the late sixteenth and throughout the seventeenth century the main function of the trial was to grant an opportunity to the accused to confront the prosecution's case and the evidence gathered against him. In order to preserve the spontaneity and truthfulness of his account of the events, the accused had to remain ignorant of the prosecution's case and the evidence collected against him until confronted with it at trial. Disclosure was foreign to the criminal procedure as it threatened the strength of its foundations.
Once disclosure permeated the English legal system, its development was influenced by the response of the system to severe miscarriages of justice. We have discussed the 1974 Judith Ward case which marked a turning point in the regulation of the prosecution's obligation to disclose material to the accused in criminal proceedings. In that case the withholding of essential expert evidence changed the course of the trial leading to the unjust conviction of the accused.

In France prior to the 1789 revolution the criminal law system was characterised by cruelty and arbitrariness. The detention of the suspect in order to obtain information through torture was common practice and no disclosure occurred in such proceedings.
The 1789 Revolution intended to eradicate the inequality and discrimination upon which the system was built through the affirmation of, *inter alia*, the defence's rights. The *Déclaration des Droits de l'Homme et du Citoyen* envisaged a single legal system applicable to all and based on the presumption of innocence, the abolishment of cruel and inhuman punishment as well as the abolition of arbitrary arrest and detention. Guarantees to the accused in jury trials became part of the system.

Disclosure in these criminal systems was part of the response to situations which had become unacceptable, unfair and arbitrary and had led to the questioning of the functioning of the entire system.
However, disclosure also relates to another feature of criminal proceedings, namely their expeditiousness. Criminal proceedings must be carried out efficiently and expeditiously in order to be considered as having taken place in a 'reasonable time'. Smooth and prompt disclosure of the relevant material to the defendent became an inseparable feature for the effective operation of criminal proceedings.
Disclosure is a complex legal issue which involves several subjects as it is not limited to disclosure between the prosecutor and the defence but it can encompasses disclosure to the judges, disclosure from the police to the prosecutor or even disclosure from a third entity to the parties to criminal proceedings.

For instance in England, the prosecution presents a tripartite scheme which involves the police, the prosecutors and the barristers. This has implications in relation to the disclosure process insofar as it fragments its operation. The split structure of the English system of prosecution makes the effectiveness of the disclosure scheme dependent on

the activity of more than one subject increasing the risks of gaps in the process.
We have seen that at the ICTY and at the ICC disclosure matters are litigated extensively with consequent delays in the proceedings. The ICC *Lubanga* case shows that complications in the disclosure process may arise due to the interaction between the prosecutor and a provider of confidential information. The case was halted by the Chamber due to the incapacity of the prosecutor to disclose exculpatory material to the defence and the judges because of a confidential agreement with the UN. The *Lubanga* example is also of interest because it presents a scenario in which the safeguarding of the defendant's right to the disclosure of potentially exculpatory material conflicts with the interest in confidentiality of a third party and ultimately with the advancement of the trial.
These examples show that smooth disclosure of information in criminal proceedings plays a crucial role in facilitating their efficiency and expeditiousness. In contrast, poor disclosure may affect the proceedings leading in, extreme cases, to harm the prospect of reaching a verdict.

3. Against this background, what material should be disclosed?

3.1 Introduction

Providing an answer to this question is a rather complicated exercise. The material one party should disclose to the other may depend on several factors such as the peculiarities of each criminal system, the procedural structure and the different stages of proceedings. In addition to this, the particular nature of a case may require the disclosure of items of material that in other cases would be irrelevant.

Material and information may be the object of disclosure before they are turned into evidence and even material which ultimately will not become evidence may be important to disclose. The English legal system struggled with the issue of the disclosure of the prosecutor's unused material. On the other hand, in systems of an inquisitorial tradition, such as the French, the existence of a dossier or case file bypasses the issue of unused material.

The ICC procedural system is of assistance in showing how the subject matter of disclosure can change according to the different phases of the proceedings. The establishment of an adversarial hearing to confirm the charges brings disclosure to the spotlight at a moment at which it is not even sure that the case will reach the trial stage. Material that can be withheld by the prosecutor in preparation for the confirmation hearing may be subject to disclosure at a later stage. In the *Katanga* case, before the confirmation hearing, the Appeals Chamber granted non-disclosure of the identities of persons, other than the witnesses, who could be equally endangered if disclosure was ordered. However, it stated that while non-disclosure of certain information may be permissible prior to the hearing to confirm the charges the conclusion might be different in the preparation for trial.[5]

5 *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, AC, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber Entitled "First Decision on the Prosecutor Request for Authorization to Redact Witness Statements", 13 May 2008, para. 68.

Another factor relevant to the determination of the subject matter of disclosure is who is going to be the recipient of such disclosure. This consideration calls into play the interesting issue, addressed in this section, of the role played by the judges in criminal proceedings. Should the judges see all the material disclosed between the parties at all times?

Interestingly enough, this question is answered differently by the ICC Pre-Trial Chambers.
We have discussed the two different judicial approaches to material that should be communicated to the Pre-Trial Chamber prior to the confirmation hearing. According to the first approach, only the evidence which will be used at the confirmation hearing should be communicated to the PTC. According to the second, the scope of the communication to the PTC includes all the material exchanged between the parties regardless of their intention to use it at the hearing.

These are but a few examples useful for appreciating the impossibility of drawing up a definitive list of the material which should be disclosed at all times to the defendant and to the judges in any criminal proceedings.
However, it seems possible to single out several core items of material whose non-disclosure would hamper the fairness of the proceedings.

3.2 Subject matter of disclosure

Broadly speaking disclosure should put the defendant in the position where he has knowledge of the charges against him, the incriminating material which will be used at trial as well as knowledge of all the exculpatory or potentially exculpatory material gathered and/or known by the prosecutor regardless of his intention to use it at trial. This can be considered the core of the prosecution's disclosure in criminal trials. Once a defendant is acquainted with these elements, he has adequate knowledge to prepare his defence. Disclosure of such elements takes place differently in systems of adversarial tradition and systems of more inquisitorial nature.

The starting point of this analysis is the disclosure to the accused of the charges against him. The ECtHR illustrated that the information must be disclosed in detail and it must always be sufficient for the accused to be able to "understand fully the extent of the charges against him with a view to preparing an adequate defence".[6] The information must state the facts underlying the charge clearly and the crime's circumstances, place, time and any accomplices the accused may have had.

The comparative analysis of the criminal systems investigated highlights the different ways in which they regulate disclosure of the charges.

In England the police must ensure that adequate information is given to the suspect immediately following his arrest. In cases involving less serious offences (which

6 *Mattoccia v. Italy*, ECHR, no. 23969/94, 25 July 2000, para. 60.

constitute the majority of cases) it is indeed the police who charge the suspects. In cases that concern more serious offences such as, for instance, murder or rape the police need the authorisation of the crown prosecution service before charging a suspect. When a suspect is not arrested a summons is issued by the police and delivered to the suspect.

In Italy, unless he decides to drop the case the prosecutor must give the defendant notice of the conclusion of the preliminary investigations. The information contains, *inter alia*, a summary description of the facts underlying the proceedings, the rules of law allegedly violated and the *locus commissi delicti*.[7] Following this communication the defendant is entitled to inspect and make a copy of the material gathered during the investigations.

In France, the opening of an *instruction* marks the moment at which the accused, through his lawyer, is granted access to the dossier. However if he is placed in *gard à vue* he must be immediately informed of the nature of the crimes being investigated.[8] This provision, although rather generic in its formulation, marks the first, although limited, disclosure of information to the suspect during the proceedings. The official accusation against a suspect is notified to him when the case is committed for trial.

The ICTY Rules of Procedure and Evidence state that the indictment is served on the accused at the time he is taken into custody or as soon as reasonably practicable thereafter.[9] Moreover, within thirty days of his initial appearance he must be provided with a copy of the supporting material that accompanied the request for confirmation of the indictment as well as all prior statements obtained by the Prosecutor from the accused.[10]
Finally, the ICC Statute and the Rules of Procedure and Evidence stipulate that the suspect is entitled to the disclosure of a detailed description of the charges together with a description of the evidence which the Prosecutor intends to present at the confirmation hearing.[11]

Once the charges (and the supporting material) are known to the defendant the disclosure of the material gathered during the investigations comes into play. A person charged with a criminal offense has the right, according to the ECtHR, "to acquaint himself, for the purpose of preparing his defence with the results of the investigations carried out throughout the proceedings".[12] In principle, all material collected during the investigation should be the object of disclosure to the defendant as long as it is relevant for the preparation of his defence (unless competing interests conflict with full disclosure).

7 Code of criminal procedure, Article 415 bis.
8 Article 63-1 *Code de procedure penale.*
9 ICTY RPE, Rule 53 bis.
10 ICTY RPE, Rule 66(A)(i).
11 ICC Statute, Article 61(3) and ICC RPE, Rule 121(3).
12 *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, para. 56.

The Strasbourg Court clarified this principle stating that "if the element in question [collected by the authorities] is a document, access to that document is a necessary facility" if it concerns an act of which the defendant is accused.[13] This kind of material includes the transcripts of the interrogations that the police, the investigating and the prosecuting authorities have carried out with the defendants and the witnesses, pictures of the crime scene, reports of searches, experts' opinions, confiscated documents, maps as well as recordings of wire taped conversations.

The material gathered during the investigations by the prosecution can be divided into material that will be used at trial and material that will not be part of the prosecutor's case.

The incriminating material that the prosecutor intends to use must be disclosed to the defence. This category includes the details and statements given by witnesses who will testify as well as the identity of experts and their reports.

The Italian criminal procedure stipulates that, at the latest seven days before the date set for the beginning of the trial, both parties must submit a list to the registry of the court with the names of the witnesses, experts and technical counsel they intend to call to testify indicating the circumstances on which their testimony will be given.[14] The disclosure of evidence takes place at trial when the parties tender the documents asking the judge their admission. The French criminal procedure ensures that once the accused has been *mise en accusation* and will therefore stand trial (before the Assize Court) he is provided with, *inter alia*, the written statements of witnesses as well as the experts' reports.[15]

The ICTY RPE require the Prosecutor to disclose to the Defence within the time limit prescribed by the Trial Chamber (or by the pretrial Judge) copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. Likewise, copies of the statements of additional Prosecution witnesses shall be made available to the Defence when a decision is made to call those witnesses. The ICC legal instruments have similar provisions.

Furthermore, disclosure may also cover the written submissions filed with the court by the parties as well as the advisory opinions from an independent member of the national legal system. An example of this type of disclosure can be found in the ICC's procedure where Rule 121(9) explicitly provides the parties with the possibility of filing written submissions in preparation for the confirmation hearing. It further states that a copy of these submissions must be transmitted to the other party immediately.

13 Ibid. at para. 58.
14 Code of criminal procedure, Article 468.
15 Code de procédure criminelle, Article 279.

3.3 Disclosure of unused material

Not all the material collected from an investigation will be used by the Prosecutor to corroborate his case. There will be material that remains in his possession unless the criminal procedure requires its disclosure. However, what is irrelevant from the Prosecutor's perspective may be quite different from the Defence's perspective. The inversion of points of view may lead to a different assessment of the same item. For instance, while a fruitless search of a house is simply a waste of time for the Prosecutor in the course of the investigations, in the eyes of the Defence it can be an element capable of corroborating its strategy.

The disclosure of unused material is a thought-provoking issue insofar as it is the prosecutor who assesses the material in his possession in order to determine what could be of assistance to the defence. The comparative analysis reveals that, in systems that embrace an adversarial tradition, the liklihood of the defence obtaining evidence relevant for its defence depends on the evaluation of its usefulness by the police or Prosecutor.

In England for example, while no controversies arise over the disclosure of material the prosecutor will use at trial, one of the major challenges faced by the disclosure regime was the management of the prosecutor's unused material. In relation to exculpatory material the disclosure test entails an evaluation of what might undermine the prosecution's case and assist that of the defence. This is a very difficult test to carry out especially when it is not performed by the defence. Moreover, "while items of material viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the accused, several items together can have that effect".[16]

The ICTY and the ICC employ an identical test in relation to the inspection of material in the prosecutor's possession that will be not relied upon at trial. Specifically, the defence is allowed to inspect books, documents, photographs and other tangible objects only if the prosecutor determines that they are relevant to the defence's preparations.[17] The ICTY jurisprudence provides guidance as to the test that the prosecutor must carry out in order to evaluate items of material in relation to the defence's case. The material in question must be: "(1) relevant or possibly relevant to an issue in the case; (2) able to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2)".[18]

3.4 Disclosure of exculpatory material

Of the utmost importance for the defence among the material that will not form part of the prosecutor case is exculpatory or potentially exculpatory material.

16 Attorney General's Guidelines on Disclosure, 2013, para. 7.
17 ICTY RPE, Rule 66(B) and ICC RPE, Rule 77.
18 *Prosecutor v. Delalić et al.*, IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 7.

This kind of material has the potential to significantly influence the fairness and outcome of the proceedings and as such should always be made available to the defence.

In France and Italy, disclosure of the results of the investigations in preparation for trial takes the shape of access to the case file containing all the material collected in the investigation. Therefore the problem of unused material is lessened since the dossier also contains that kind of material.

In England, the current practice envisages the prosecutor's obligation to disclose any unused material "which might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused".[19] The House of Lords clarified that "fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence...The golden rule is that full disclosure of such material should be made."[20]

The ICTY RPE states that material which is known to the Prosecutor and is favourable to the accused in the sense that it suggests the innocence or might mitigate the guilt of the accused or may affect the credibility of the prosecution's evidence must be disclosed to the defence as soon as practicable.[21] Exculpatory material also includes "material which may put an accused on notice that such material exists".[22] Moreover, the jurisprudence of the Tribunal sheds light on the Prosecutor's assessment of the material in his possession affirming that the standard for assessing the exculpatory nature of the Prosecution's material is whether there is any possibility, considering the parties submissions, that the information in question could be relevant to the Defence.[23]

The ICC Statute envisages the same disclosure obligation and adopts an almost identical definition in which the term evidence replaces the term material.[24] However, in *Lubanga* the Trial Chamber defined the notion of exculpatory evidence in the same way as it is defined by the ICTY namely as material (and not only evidence) that shows the innocence of the accused; which mitigates the guilt of the accused; and which may affect the credibility of Prosecution's evidence.[25] Both systems envisage the disclosure of such material to take place as soon as practicable and characterise it as a continuous obligation on the prosecutor. The ICC criminal procedure, unlike the ICTY, codified the prosecution's obligation to investigate incriminating and exonerating circumstances equally.

19 Criminal Justice Act 2003, section 3(1)(a).
20 *R* v *H and C*, [2004] UKHL 3, at 147.
21 ICTY RPE, Rule 68. See also *Prosecutor v. Delalić*, IT-96-21, Decision on the Request of the Accused Pursuant to Rule 68 for Exculpatory Information, 24 June 1997, para. 12.
22 *Prosecutor v. Haradinaj et al.*, IT-04-84, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 Bis, 12 October 2011, para. 38.
23 Ibid.
24 ICC Statute, Article 67.
25 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 59. See ICTY Rule 68.

Ultimately the material that will be disclosed may be dependent more on the assessment of that material than on the category to which it belongs. This is unsatisfactory particularly in relation to exculpatory and potentially exculpatory material in possession of the prosecutor. This issue will be dealt with in greater detail when discussing the prosecutor's role.

4. How can disclosure be achieved?

4.1 Two different approaches

The criminal procedures which have been investigated reveal two different ways of achieving disclosure in criminal proceedings. On the one hand, disclosure can be accomplished through the adoption of a set of technical procedural rules or provisions laying out clear obligations to disclose. This model is typical of common law systems. On the other hand, disclosure can be achieved mainly by the defendant consulting the case file or dossier. These are the two main approaches to the regulation of disclosure in criminal proceedings. Interestingly, the research conducted seems to reveal, particularly in international criminal procedure, an ongoing tendency to introduce elements of an inquisitorial model of disclosure into systems which regulate disclosure through procedural rules.

4.2 The procedural rules/provisions approach

Systems that adopt detailed procedural rules or provisions to regulate the disclosure of information in criminal proceedings are characterised by a disclosure scheme or process which is made up of different stages. In order to function, this model requires the full engagement of the prosecutor and the defence and its effectiveness is ultimately dependent on their conduct. The introduction of the defence's obligations to disclose in an adversarial criminal system represents a radical change that stands in stark contrast to the Anglo-Saxon tradition where no such obligations can be found. Moreover, as mentioned, these procedural systems require the prosecutor to assess the material in his possession from the perspective of the defence, which creates significant difficulties for process as a whole. The prosecution's disclosure can be divided into two stages. The first stage is autonomous and regards the first assessment of the material gathered through the investigation. In the second stage disclosure is reactive. This segment still requires the prosecutor to appraise the material through the lense of the defence's case. However, the assessment is guided by the defence's disclosure of information about its case and strategy.

The procedural systems of England and the International Criminal Tribunal for the former Yugoslavia provide good examples of this model of disclosure. In these systems disclosure is achieved through the adoption of specific legal provisions (England) or procedural rules (ICTY). Both systems are strongly influenced by the adversarial legal tradition where no case file, in its civil law meaning, is created in the investigation and disclosure takes place according to a procedural scheme

involving both parties.

Interestingly, the English criminal system is characterised by the absence of one consolidated text on disclosure. There are a multiplicity of sources from which guidance as to the operation of the disclosure process can be found. The plurality and combination of protocols, manuals, guidelines and statutory law on disclosure however, generates confusion.
It suffices to recall that the operation of the Criminal Procedure and Investigations Act, as amended by the Criminal Justice Act, is guided by several tools among which are the Criminal Procedure Rules (2014) and the Code of practice which is issued in part 2 of the CPIA.[26]
Furthermore, the judiciary issued a disclosure Protocol for the Crown and the Magistrate's Courts (2006)[27] as well as a Judicial Protocol on the disclosure of unused material in criminal cases (2013)[28]. The Attorney General issued Guidelines in 2000 in order to assist the operation of the statutory regime on disclosure. In April 2005, the Attorney General issued new Guidelines on the disclosure of unused material in criminal proceedings. In July 2011 the Supplementary Attorney General Guidelines on Disclosure, Digitally Stored Material were issued. In December 2013 new Attorney General Guidelines on Disclosure were issued which replaced the previous ones.
Furthermore, in 2005a disclosure manual for the police and the Crown Prosecution Service was created.[29] Finally, operational instructions for investigators and prosecutors can be found in the disclosure manual issued by the Association of Chief police officers and the CPS.

These provisions regulate what in essence is a disclosure process articulated in three different stages: the primary prosecutor's disclosure; the defence disclosure and the secondary prosecutor's disclosure.

Similarly, the ICTY Rules of Procedure and Evidence, under the heading "production of evidence", regulate the prosecutor's and defence's disclosure as well as disclosure of exculpatory material, failure to comply with disclosure obligations and restrictions on disclosure. The regulation of disclosure through these Rules was influenced by two major factors: the numerous amendments to the RPE, which at the time of writing amount to 49, and the contribution made by the Tribunal's jurisprudence to the interpretation and practical operation of the Rules.

26 The Criminal Procedure Rules regulate the way a criminal case is managed. They apply in all magistrates' courts, the Crown Court and the Court of Appeal. The latest edition entered into force on 6 October 2014. The Code of Practice, as recorded in its Preamble, sets out "the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters".

27 The protocol's title is: *Disclosure: A Protocol For The Control And Management Of Unused Material In the Crown Court* (the Disclosure Protocol). It was issued by the Courts service in February 2006.

28 As stated in its foreword, the Protocol (which is applicable to all criminal Courts in England and Wales) was prepared following the recommendations of Lord Justice Gross in his September 2011 'Review of Disclosure in Criminal Proceedings'. It also takes account of Lord Justice Gross and Lord Justice Treacy's 'Further review of disclosure in criminal proceedings: sanctions for disclosure failure', published in November 2012.

29 The combined efforts of the CPS and the association of Chief Police Officers gave birth to the *Disclosure Manual* that provided operational instructions in the implementation of disclosure principles and procedures. The Manual reflected the Prosecution approach to disclosure obligations and was the authoritative guidance on practice and procedure for all police investigations and CPS prosecutors.

4.3 The dossier approach

At the opposite end of the spectrum there are criminal law systems where the creation of a case file is an essential characteristic of the proceedings. In these procedures disclosure is not regulated by a set of procedural rules but rather it coincides with the moment at which a defendant or his lawyer is granted access to the so-called dossier. The case file contains the material collected during the preliminary investigation by the police under the supervision of the prosecutor.

The analysis carried out reveals the tendency to keep the dossier's content from the defence during the investigation and postponing the defendant's access to it to upon its completion. From that moment on the defence may influence the content of the dossier through the result of its own investigation as well as by demanding the prosecuting authority carry out a specific investigation considered necessary for the accused's case.

Italian criminal procedure, despite its recent reform moving it in the direction of a more adversarial procedure, still provides an interesting example in this regard. Italy uses the so-called "double-dossier system". The procedure is based on an initial dossier where the material collected during the preliminary investigations is gathered and a second dossier to be used at trial. The structure is interesting. The investigations are carried out by the police under the direction and supervision of the prosecutor. The suspect may remain unaware that he is being investigated. All the material collected goes into the preliminary investigation dossier. Once the investigations are concluded the suspect is informed and granted access to the content of the dossier. Disclosure of the results of the investigation is carried out at this stage. Moreover, within twenty days of notification, the suspect can file submissions, exhibits and documents as well as present the material gathered by the defence's investigations that may have been carried out. He can also ask the prosecutor to undertake further investigation on his behalf and can request he be interrogated. The notice given to the suspect pursuant to article 415 *bis* is an instrument that triggers an informed and adequate response from the defence.[30]

Once the results of the defence's activity have been incorporated in the dossier a preliminary hearing is held to decide whether or not the case should be committed to trial.
The judge for the preliminary hearing and the parties form the trial dossier immediately after the case is referred for trial.[31] In theory, the trial dossier should be empty when it reaches the trial judge but in practice the code allows for certain exceptions. Consequently, it is essential that the parties to the trial and the judge who supervises the preliminary hearing are involved in the formation of the dossier whose content will be used at trial in order to safeguard the fairness of the trial. The trial dossier may take from the investigative dossier, *inter alia*, the

30 Bonzano C., *Avviso di conclusione delle Indagini: L'Effettività della Discovery Garantisce il Sistema*, Diritto Penale e Processo, 2009, 10, 1281.
31 Article 431 CPP.

charging documents, the records of investigation which are objectively impossible to reproduce in court, the evidence admitted during the investigations from the parties being confronted before a judge, the records concerning the *corpus delicti* and the records of the accused's prior convictions, if applicable. If the parties agree further documents collected during the investigations (both defence and prosecution documents) can be inserted in the trial dossier.

4.4 Procedural fluctuations in the achievement of disclosure

The study conducted reveals trends or "procedural fluctuations" in the regulation of disclosure. Specifically it shows the appearance of inquisitorial features in the disclosure process adopted by the ICC as well as the preservation of a dossier approach to disclosure in the Italian system despite its attempt to move towards an adversarial model of criminal proceedings. I will try to elaborate on this point.

A peculiarity of the ICC criminal procedure is the Registry's duty to create and maintain a full and accurate record of the whole proceedings before the Pre-Trial Chamber. The record includes all documents and material disclosed between the parties and communicated to the Pre-Trial Chamber. The record may be consulted by the Prosecutor, the Defence and the victims or their legal representatives. Once the charges are confirmed and the case is ready for trial the record is sent to the Trial Chamber.

The creation of the record relates to disclosure insofar as the record is made available to the Pre-Trial and Trial Chambers. This kind of disclosure involves the judiciary and its powers in the context of criminal proceedings.
During the negotiations for the Rome Statute the access to the records of the pre-trial proceedings that the Pre-Trial Chamber would enjoy was not fiercely debated and all the delegations agreed that evidence disclosed *inter partes* should be disclosed to the PTC.[32] Even the common law lawyers felt at ease with this setup in the light of the fact that the Pre-Trial Chamber does not decide on the merits of the case.[33]

The Trial Chamber's access to the Pre-Trial record was a more problematic issue. Also controversial was whether evidence disclosed *inter partes* following the confirmation hearing should be communicated to the Trial Chamber and therefore whether the pre-trial record should be updated in this sense. On these issues a civil law/common law contrast became clear in the light of the opposite view that these two legal traditions hold on these matters.[34] The inquisitorial systems consider it normal that the Trial Chamber be informed of the case before the beginning of the trial. This is because in order to effectively run the trial judges must have prior

32 Brady H., *Disclosure of Evidence*, in Lee R.S., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers 2001, p. 424.
33 Schoun C., *International Criminal Procedure a Clash of Legal Cultures*, T.M.C. Asser Press, 2010, p. 298.
34 Klamberg M., *Evidence in International Criminal trial: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publisher 2013, p. 318.

knowledge of the case. This is in contrast to the adversarial system that envisages the judge as a passive umpire in a party-led trial. This understanding of the judge's role becomes impossible when the judge has prior knowledge of the case.

The creation of the record of the pre-trial proceedings is a feature that significantly resembles the dossier of inquisitorial tradition where the material collected during the preliminary investigations is gathered.[35] The ICC may have laid the foundation for the departure from technical and complex rules of procedure as the preferred approach to achieve disclosure in international criminal proceedings.

The Italian criminal law system is also of interest in this respect. As we have seen, the structure of the Italian criminal procedure is based on the "double dossier system". The first dossier where the material collected during the preliminary investigations is merged and the second dossier which is used at trial. What is peculiar is that the system of procedure which clearly moved towards the Anglo-Saxon legal tradition with the adoption of a new code did not embrace the procedural nature typical of an adversarial procedure but rather preferred to retain what was probably considered a more suitable way to achieve disclosure.[36]
These two examples seem to reinforce the argument that disclosure can be better achieved through the creation of a case file containing the material gathered during the investigations both by the prosecutor and the defence; particularly in the context of international criminal proceedings where the amount of material collected is enormous and the defence's resources for investigation are a fraction of those available to the prosecutor. This issue will be discussed later dealing more specifically with disclosure in international criminal proceedings.

5. Disclosure and the Prosecutor

5.1 Introduction

The prosecutor is the main actor in the disclosure process. In the procedural systems analysed it is on the Prosecutor's shoulders that most of the disclosure obligations fall, regardless of whether disclosure is achieved through access to the dossier or through procedural rules. The following subsections assess the results of the comparative analysis conducted giving account, on the one hand, of the legal obligations to disclose which must be fulfilled by the Prosecutor and on the other hand of the different nature of the role played by this figure in different criminal systems.

5.2 Legal obligations to disclose

While in criminal procedures which adopt a dossier model the prosecutor's legal obligations to disclose can be attributed to the creation and discovery of the

35 Simon De Smet submits that the ICC Pre-Trial record could be used as a "quasi dossier". De Smet S., *A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Process of the ICC*, in: Stahn C. and Sluiter G., *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers 2009, pp. 204-240.

36 For the adoption of the same system in the ICC framework see Heinze A., *International Criminal Procedure and Disclosure: An Attempt to Better Understand and Regulate Disclosure and Communication at the ICC on the Basis of a Comprehensive and Comparative Theory of Criminal Procedure*, Dunker & Humblot, Berlin, May 2014.

dossier, in procedures which regulate disclosure through procedural rules the defence's participation in the disclosure process assumes significant importance for the effectiveness of its operation.

In England, for instance, the disclosure procedure adopted by the Criminal Prosecution and Investigation Act was originally based on a two-stage disclosure scheme. A primary disclosure concerning all undisclosed material that in the opinion of the prosecutor "might undermine the case for the prosecution against the accused" was followed by a secondary disclosure made in the light of the defence's statement highlighting the nature of the accused's defence. The secondary disclosure covered all previously undisclosed material, which, in light of the defence's statement, "might be reasonably expected to assist the accused's defence".

The amendments adopted by the Criminal Justice Act ended the prosecution's double disclosure and introduced one single test where the prosecution carries out an assessment of what must be disclosed to the defence. The secondary disclosure triggered by the defence's statement was removed. The new test requires the prosecution to disclose all the material that "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".[37]

However, although the prosecution's secondary stage of disclosure was removed from the procedure the prosecution is still under similar duties once the defence has given the statement underlying the nature of the accused's defence.[38] It is indeed the defence's statement that allows the prosecutor to know more of the defendant's case and to assess the material in his possession in the light of the new information. There is therefore a strong tie between prosecution's and defence's disclosure. The disclosure scheme needs the defence to engage in the process in order for it to function.

An essential aspect of the law on (the prosecution's) disclosure in the English legal system is the process of revelation by which the police inform the prosecution of the material gathered in a criminal investigation. This is a very delicate juncture of the disclosure procedure. Scheduling is particularly important as it is the formal link between the investigator's role and that of the prosecutor.[39] A mistake made at this stage will potentially compromise the effectiveness of the disclosure process and the fairness of the whole trial. The police are given significant responsibility in relation to the assessment, classification and registration of the material gathered during the investigation.
The ICTY and the ICC present consolidated texts regulating legal obligations to disclose. The main instruments are the Statute and the Rules of procedure and evidence that contain the provisions regulating disclosure.

37 Criminal Justice Act 2003, section 3(1)(a).
38 Criminal Justice Act 2003, section 7A(5).
39 See the Review of Disclosure in Criminal Proceedings, Lord Justice Gross, September 2011, para. 120.

The Rome Statute covers certain procedural areas that at the ICTY are regulated by the Rules of procedure and evidence, of which disclosure is one. Article 54 of the ICC Statute sets two important obligations for the Prosecutor regarding disclosure. On the one hand, it stipulates the Prosectutor's obligation to investigate incriminating and exonerating circumstances equally. On the other hand, it provides the possibility for the prosecutor to avoid the disclosure of documents or information obtained through confidentiality agreements, which were made for the purpose of generating new evidence. Furthermore, the Statute touches upon the Prosecution's disclosure, direct or indirect, in relation to the rights of the accused (Article 67), the confirmation of the charges before trial (Article 61) and the functions and powers of the Trial Chambers (Article 64).

The ICTY and ICC's different procedural structures entail differences concerning the Prosecution's legal obligation to disclose before trial. At the ICTY, the indictment is confirmed by a Single Judge (so-called reviewing judge) through a swift *ex parte* hearing not involving the Defence and where the Prosecutor will produce evidence supporting the indictment without any counter argument or counter production from the other side. Consequently, the first disclosure by the Prosecutor occurs within thirty days of the initial appearance of the accused and it requires him to provide copies of the supporting material that accompanied the request for confirmation of the indictment as well as all prior statements obtained by the Prosecutor from the accused.[40]
The ICC procedure has a more structured procedure for confirming the charges. We have seen that a confirmation hearing is held where the Defence can participate by testing the Prosecutor's evidence and submitting its own. This procedure entails significant disclosure obligations for the Prosecutor. In fact, no later than thirty days before the hearing, the Prosecutor must disclose a detailed description of the charges and a list of the evidence he intends to present at the hearing. Moreover, written submissions lodged with the Pre-Trial Chamber for the purposes of the confirmation hearing must be disclosed to the Defence.

Therefore, at the ICTY the Prosecutor's disclosure in relation to the charges takes place *ex post facto* after the confirmation of the indictment and it is rather limited in its scope. Unlike at the ICC, the Defence's ability to participate in the confirmation hearing (which is adversarial in nature) anticipates the Prosecution's legal obligations to disclose and broadens their scope.

In the preparations for trial both systems envisage two different kinds of disclosure obligations for the Prosecutor; an obligation to disclose to the Defence in its more traditional meaning of revealing and delivering material in the possession of the prosecutor and an obligation to allow the other party to inspect books, photographs, maps and tangible objects at the OTP premises. While disclosure between the parties (in its traditional sense) requires the Prosecutor to play an active role who is called upon to reveal and hand over material to their counterpart, inspections

40 ICTY RPE, Rule 66(A)(i).

entail a more "passively open" attitude on the part of the prosecutor who must allow his opponent access to certain material in his possession. Examples of *inter partes* disclosure are the Prosecutor's delivery of exculpatory material to the Defence and the disclosure of the names and statements of the witnesses he intends to call at the trial; material relating to the general use of child soldiers in the Democratic Republic of the Congo was found to belong to the second category.[41]

5.3 Role of the Prosecutor: party to the proceedings, impartial figure or both?

5.3.1 Introduction

Among the systems investigated, England and France present the two classical opposite configurations of the prosecutor in criminal proceedings: party to the proceedings and impartial figure. However, the criminal procedure in Italy, the ICTY and the ICC embrace *sui generis* connotations of the role of the prosecutor where features of one legal tradition are blended with elements of the other.

5.3.2 The two ends of the spectrum

In England, the prosecution is a party to the proceedings who confronts the defence at trial. From this struggle the truth as to the guilt or innocence of the accused will eventually emerge. The state is not involved and criminal proceedings are left in the parties' hands.

We have seen that the prosecution in England is a tripartite structure involving the police, the prosecutor and the barrister. Each of these figures plays a clear role in criminal proceedings. Therefore, when considering disclosure we cannot limit our ambit of analysis to the prosecutor in the most classical meaning.
One of the criticisms to the tripartite structure of the English prosecution is that it prevents the prosecutor from having ownership of his case. At least in relation to disclosure such criticism appears to be valid. However, a review of disclosure in criminal cases carried out in 2011 did not suggest the abandonment of the split structure of the prosecution although it stressed the importance of the prosecutor's involvement in matters of disclosure.

The French criminal law system offers the opposite understanding of the role of the prosecutor where the prosecutor is portrayed as an impartial figure. In France the public prosecutor, the investigating judge and the trial judge belong to the same judicial body, namely the *magistrature*. They are appointed following the same competition and the same training at the National School of the Judiciary (É*cole nationale de la magistrature)*. It is believed that the affiliation to the *magistrature* instilled in its members a "universal professional ethos"[42] and the

41 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 82.
42 Hodgson J., *French Criminal Justice, A Comparative Account of the Investigation and Prosecution of Crimes in France*, Hart Publishing, Oxford and Portland Oregon, 2005, p. 69.

society entrusts them with the protection of the public interest. However, while the judges enjoy constitutional independence, the prosecutors are hierarchically subordinated to the Ministry of Justice. The prosecution service is conceived, in fact, as the means of implementing the government's criminal policy and therefore it is guided in the performance of its functions by general instructions and specific directives from the Ministry of Justice.[43] The prosecutor must remain accountable to the government which, even if indirectly, is the expression of the people's will. In addition, the hierarchical structure is seen as a way of enforcing a uniform and coherent government policy on crime at the national level.
The code of criminal procedure states that the prosecutor "exercises the public action and formally requests the law to be enforced".[44] The prosecutor enjoys considerable discretion in relation to the judicial qualification to give to the acts investigated as well as in relation to the timing of the transfer of the case to the investigating judge.

The English and French systems belong to the two different models of government approach to criminal justice depicted by Damaška.[45] The English system provides an example of a reactive state model where, in essence, the state considers legal proceedings as a contest between individuals and limits its action to "providing a supporting framework within which its citizens pursue their chosen goals".[46] Proceedings in reactive states are "conflict solving" and the state is called into play only when the parties, which are conceived as equal, are not able to solve the conflict between them.
The French system however, is an example of an activist state model where the state takes the administration of criminal justice into its own hands. In active state models state interests have priority over individual interests.[47] Proceedings in an activist state are "policy implementing" as through the justice system the state implements its policy of crime prevention and repression.[48]

5.3.3 The sui generis connotation of the role of the prosecutor

So far we have seen the two opposite extremes of a hypothetical spectrum. However, the analysis carried out brings to light different, and somewhat more *sui generis*, configurations of the prosecutor in the legal systems of Italy, the ICTY and the ICC.

For instance, in Italy the reform of the criminal procedure in the direction of an adversarial legal tradition introduced changes to the role of the prosecutor.
In the current system there is a clear distinction in the preliminary investigation stage between the investigative and the judicial functions. The former is assigned to the prosecution and the latter to the judge for the preliminary investigation.[49]

43 Article 30 *Code de procedure penale.*
44 Article 31 *Code de procedure penale.*
45 Damaška M., *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*, Yale University Press, 1986. See also Damaška M., *The Uncertain Fate of Evidentiary transplants: Anglo-American and Continental Experiments*, American Journal of Comparative Law, 1997.
46 Damaška, above n. 45 at p. 73.
47 Ibid. at p. 87.
48 Ibid. at p. 82.
49 See Articles 326-328 of the CPP.

The figure of the investigating judge (*giudice istruttore*) clearly inspired by the inquisitorial tradition of French origin, which combined both functions, was abolished.

The prosecutor conducts the investigation assisted by the police. The scope of the preliminary investigation is no longer the finding of the truth as it was under the former code but to determine whether or not to prosecute the case. The Code of criminal procedure states that "the prosecutor completes every activity necessary under article 326 CPP and also assesses the facts and circumstances favouring the person under investigation". However, in the course of the preliminary investigation the prosecutor also collects material favourable to the accused in order to assess the strength of his own case before deciding whether to request its committal to trial.[50] Consequently, it is in the interest of the prosecutor to assess all the elements available to him, which however does not equate to carrying out an investigation in the interest of the suspect in an impartial fashion as it was under the previous code.

Nevertheless, certain inquisitorial features remained. The cultural aspect of this figure still plays a role. For instance the inquisitorial principle of the obligatory nature of the prosecution was not relinquished in favor of the discretion to prosecute.. Therefore, prosecutors are obliged under the Constitution to initiate a preliminary investigation once they are informed of a criminal act.

Furthermore, the prosecutor maintains his predominant, and sometimes monopolistic, role in the preliminary investigation. The possibility that a suspect might not know he is being investigated until the completion of the process is tolerated because the prosecutor is still considered as having the same impartiality that was a crucial element of the previous system. This is understandable if we consider that, as far as its professional collocation is concerned, the prosecutors continue to belong to the same judicial body of the preliminary investigation judges, preliminary hearing judges and trial judges. They are all appointed through the same national competition and they can, upon request, move back and forth from one position to another with no formal restriction.[51] In other words, they are colleagues belonging to the same professional group but exercising different functions within criminal proceedings. Furthermore, prosecutors, unlike in France, are not subordinated to the Ministry of Justice and therefore are independent from the executive power.

When the criminal systems of the ICTY and the ICC are analysed together they seem to occupy different stages of a common pattern in the evolution of the configuration of the prosecutor's role in criminal proceedings.

The ICTY Prosecutor is expected to prosecute in an adversarial context and at the

50 *Cordero F, Procedura Penale* (8th Edition), 2008. Cordero states that if the prosecutor disregards [evidence favourable to the suspect], looking just in one direction, he risks a failure at trial or even before at the preliminary hearing; that the prosecutor must also consider the suspect's side is a matter of elementary caution, it is not a matter of inquisitorial opportunity.

51 Grande E., *Italian Criminal Justice: Borrowing and Resistance*, American Journal of Comparative Law, Vol. 48, 2000, pp. 227 – 243.

same time to act as a *super partes* entity of an inquisitorial nature. This construct is predominately the product of the jurisprudential interpretation of the RPE. We have discussed how the Tribunal's criminal system moved away from its original strong adversarial connotation adopting elements of inquisitorial legal tradition, which were considered more suitable to the management of complex international criminal proceedings.

The Prosecutor is in fact considered not only a party to adversarial proceedings but also an organ of the Tribunal and more in general an organ of international criminal justice. The role has been described a "Minister of Justice with an overriding obligation of ensuring fairness in the proceedings".[52] While the Prosecution must be conducted vigorously the Prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice."[53] His goal is not only to obtain a conviction but also to present the case for the Prosecution assisting the Chamber to discover the truth in a judicial setting. Therefore the presentation of the Prosecution's case must include not only incriminating but also exculpatory evidence.[54]

The Prosecutor is a party to the proceedings and therefore is not required to be neutral but he is "not a partisan" which is the ratio behind the Prosecutor's disclosure obligations particularly in relation to exculpatory material.

This construction was developed by the jurisprudence and imposed on the Prosecutor whose initial connotation was more adversarial in line with the adopted criminal tradition.

The Rome Statute foresees the Prosecutor's obligation of investigating incriminating and exonerating circumstances equally. This provision marks a significant change of direction when compared to the ICTY procedure and brings the role of the Prosecutor closer to the inquisitorial legal tradition of an investigating judge.

In the light of the above what is the preferable configuration of the role of the prosecutor in a criminal law system? While there is not a single and straightforward answer to this question, several characteristics that should define the role of the prosecution in criminal proceedings can be identified and will be discussed in the final part of this section.

52 McIntyre G., *Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, Leiden Journal of International Law, 16 (2003), p. 281.

53 *Prosecutor v. Barayagwiza*, ICTR–97–19–AR72, AC, Decision (Prosecutor's Request for Review of Reconsideration), 31 March 2000, Separate Dissenting Opinion of Judge Shahabudden, para. 68.

54 *Prosecutor v. Kupreškić et al.*, IT-95-16, Decision on Communication between the Parties and their Witnesses, 21 September 1998, p. 3.

6. Disclosure and the defence

6.1 Introduction

Disclosure is always relevant for the defence's position in criminal proceedings regardless of whether it is carried out by the prosecutor, as discussed above, or when it is the defence itself who is asked to disclose elements and/or material of its case. It is on this second aspect that the following subsections will focus through an assessment of the defence's legal obligations to disclose under some of the criminal law systems investigated. This assessment will be followed by a description of the different role that a defence counsel can play in criminal systems.

The defence represents the defendant and ensures that the criminal proceedings against him are fair. Defence lawyers pursue the best interests of their client and protect their procedural rights. However, the role that the defence can play in criminal proceedings differs, sometimes significantly, according to the legal setup of the criminal procedure in which they operate. Moreover, the degree to which the defence participates may depend on the phase of the proceedings. The defence may also be required to disclose to the prosecutor, and sometimes to the court, information concerning its own case.

In an adversarial procedure, as discussed in relation to the prosecutor, legal obligations concerning the defence's disclosure can be part of a mechanism where the defence's disclosure assists the prosecutor to assess the material in its possession in the light of the information provided by the defence about its case.

6.2 Legal obligations to disclose

The concept of the legal obligations to disclose that lie with the defence is something that was alien to Anglo-Saxon legal systems where the approach, which was based on the contest between two parties before a passive umpire forbade the adoption of such duties. The notion of defence disclosure was considered to be "the anathema to the adversarial system of justice".[55] In the adversarial tradition the accused's right to keep his defence secret until the commencement of the trial was strictly linked to the right to remain silent and to the prosecution's burden of proof.

However, things changed and nowadays several common law systems place legal obligations on the defence to disclose. Moreover, disclosure obligations have been broadened to compel the defence to reveal more about its case in an approach to disclosure defined as having their "cards on the table".[56]

In England, for instance, we have seen that the 1996 Criminal Procedure and Investigations Act introduced defence disclosure obligations in criminal

55 Niblett J., *Disclosure in Criminal Proceedings*, Blackstone Press, 1997, p. 223.
56 Gibson K. and Lussiaà-Berdou C., *Disclosure of Evidence*, in Kahn K.A.A., Buisman C., Gosnell C., *Principles of Evidence in International Criminal Justice*, Oxford University Press 2010.

proceedings. Specifically, following the primary disclosure by the prosecutor the defence had to provide the prosecution and the judge with a statement setting out, in general terms, the nature of its defence, the matters on which it took issue with the prosecution and the reasons for doing so.[57]
This obligation assists the prosecutor in assessing the material in his possession in the light of the newly revealed defence strategy, in order to determine whether the disclosure of any of such material may be considered capable of undermining the case for the prosecution or of assisting the case for the accused. Moreover, it allows the prosecutor to evaluate whether the investigators should undertake any further enquiries. This innovation was not well received by defence counsels and consequently their track record in disclosure was quite poor.

The 2003 Criminal Justice Act (CJA) strengthened the defence's disclosure obligations. The defence is still required to set out the nature of its case, but the expression "in general terms" has been removed from the text because it was considered too vague and prone to narrow interpretation by the defence counsel. The statement must also indicate any specific defence the accused intends to rely upon at trial. This change suggests that the court expects a more detailed description of the defence's case.
Furthermore, the defence's statement must set out any particular matter of fact on which the defendant intends to rely for the purposes of his case. It also has to indicate any point of law (including any point as to the admissibility of evidence) that the defence wishes to take, and any jurisprudence it intends to rely on for that purpose. The defence is also obliged to give notice of its intention to use an alibi as well as to disclose the identity of the witnesses it intends to call to testify for this purpose. Moreover, the accused must give the prosecutor and the court details in advance (i.e. name, address and date of birth) of any witnesses he intends to call at trial as well as details of any expert for the defence regardless of whether or not they intend to use them at trial.

While under the previous system the defence's disclosure took place fourteen days after the prosecution's disclosure and ended that very same moment, the CJA states that the defence must provide a further updated statement or a statement indicating that the accused will make no further changes to his previous statement of defence.[58]
The CJA also strengthened the possibility of enforcing the defence's disclosure. The jury may draw negative inferences from the defendant's conduct at trial if it is not coherent with the statement provided by the defence unless there is a justification for it, which is accepted by the court.

The disclosure obligation concerning the details of defence's witnesses envisaged by the Act is problematic insofar as it allows the police to interview them while no such possibility exists for the defence in relation to the prosecutor's witnesses. The

57 The 1996 CPIA, chapter 25, article 5(6), *Compulsory Disclosure by the Accused.*
58 CJA 2003, Section 6B.

prosecution, in fact, in serious cases, may apply to the court for an order that forbids the accused from seeking contact directly or indirectly with certain prosecution witnesses.

Similar obligations on the defence to disclose can be found in the criminal procedure of the ICTY whose regulation of disclosure is common law inspired. The Rules of Procedure and Evidence refer to the defence's disclosure as additional disclosure.[59] In the original formulation of the RPE Defence disclosure obligations were circumscribed to the notice of an alibi and nothing more. However, several amendments to Rule 67 adopted in 2008 broadened these obligations significantly. Therefore, the same trend detected in England can be seen in the Tribunal procedure.

In proceedings before the ICTY, the Defence disclosure obligations (as with those of the prosecutor) can be divided into an obligation "to reveal" to the Prosecutor and an obligation "to let [the Prosecutor] inspect" the material that the defence intends to use at trial. The Defence, at the latest one week before the commencement of its case, must disclose to the Prosecutor statements of witnesses it intends to call at trial as well as copies of all written statements taken from witnesses whose attendance is required by the Trial Chamber (Rule 92 *bis*), who have given testimony in other proceedings before the Tribunal (Rule 92 *ter*) or who are unavailable (Rule 92 *quater*). The adoption of this obligation marked a major shift from the mechanism in place before where the Defence did not have any obligation to disclose the names of its witnesses to the Prosecutor before the trial unless it intended to rely upon an alibi or a special defence.[60] Moreover, the Defence must permit the Prosecution to inspect and copy books, documents, photographs and tangible objects in its custody or control which it intends to use at trial.

As discussed above, the procedural systems of France and Italy are characterised by the existence of a dossier in which the material collected during the investigation is gathered. However, before the beginning of the trial both parties are under a clear legal obligation to disclose information to each other and to the court.

In France, the code of criminal procedure states that the accused must provide the prosecutor and the civil parties (and vice versa) and at least twenty-four hours before the beginning of the trial with the list of his witnesses and experts.[61] The list must indicate the name, profession and residence of the persons concerned.

Similarly, the Italian code of criminal procedure stipulates that when the parties intend to request the admission of the testimony of witnesses, experts and technical counsel they must deposit a list indicating their names and the circumstances on which these witnesses will testify with the Registry of the Court, at least seven days before the date set for the beginning of the trial.[62] The *ratio* of this provision is to

59 ICTY RPE, Rule 67.
60 See Klamberg, above n. 34 at p. 294.
61 Article 281 *Code de procedure penale.*
62 Article 468 Code of criminal procedure.

avoid one party submitting surprise evidence directly at trial without any previous warning to the other party. It performs a function of the discovery of the evidence (*rectius* evidence whose admission will be sought at trial) before the beginning of the trial.[63] This may be the first moment where the prosecutor discovers the elements of the defence case.[64] The discovery mechanism regulated by this provision assists the prosecutor's understanding of the strategy that the defence will follow rather than benefitting the defence.[65]

6.3 Role of defence counsel: party to the proceedings or officer of the Court?

In none of the criminal law systems investigated is the defence an organ of the Court. Defence counsel are hired by the defendant on a private basis. Even when duty counsel are appointed by the Court to represent indigent defendants the counsel in question has no direct link with the structure of the Court. However this does not mean that defence counsel have no duties *vis à vis* the court before which criminal proceedings take place.

The role played by the defence depends in a criminal systems depends on whether that system is inspired by a more adversarial tradition or an inquisitorial one. The defence's ability to carry out an investigation is an interesting example in this regard. An adversarial criminal procedure should grant and safeguard the defence right to investigate its case in order to find favourable evidence to submit at trial. This approach differs from the inquisitorial one where the figure of the *giudice istruttore* or the prosecutor, is predominant in the preliminary investigations and his impartiality safeguards the defence's rights. The defence counsel's role will be more active in the pre-trial stage in common law systems than it is in civil law ones.

The Italian criminal procedure provides an interesting model insofar as, due to its deep-rooted inquisitorial legal tradition, it was difficult to allocate lawyers for the defence with such investigative powers even when the system embraced an adversarial criminal procedure. In 2000, Law n. 397 introduced the regulation of the defence's investigation into the criminal system. The lawmaker's intention was to guarantee the effectiveness of the right of the accused to defend himself putting forward evidence to prove his case in a trial that should be run by the parties. In sum the defence was granted the right, *inter alia*, to receive or solicit statements from people informed of the facts relevant to the proceedings,[66] to request the relevant public authority for the documents useful for the investigations directly,[67] to access places in order to describe their state and to perform technical, graphical, photographic or audiovisual surveying,[68] as well as to access, following judicial authorisation, places not accessible to the public.[69] The result of the defence's

63 See *ex plurimis*, Cordero F., *Commento all'art. 468, in Codice di Procedura Penale Commentato*, Torino, 1992, p. 574.
64 See Grilli L., *Il Dibattimento Penale*, Padova, 2003, p. 44.
65 Iacoviello F.M., *Processo di Parti e Poteri Probatori del Giudice*, Cassazione Penale, 1993, p. 291.
66 Article 391 *bis* CPP.
67 Article 391 *quater* CPP.
68 Article 391 *sexies* CPP.
69 Article 391 *septies* CPP.

investigation is included in the defence dossier that will be presented to the judge (the judge for the preliminary investigation, the judge for the preliminary hearing or the trial judge).[70] The reform has created the possibility for the defence to carry out investigative activities before the proceedings begin, as well as an investigation following the issuance of the decree that commits the case for trial.[71]

The Defence can play different roles at different stages of the criminal proceedings. The differences are clearly marked in the French criminal procedure where the defence cousel has very limited involvement in the investigation. The defence counsel's role then becomes more involved once the instruction phase begins.
During the investigation the lawyer discharges his function by providing the suspect with moral support and general legal advice about his rights assessing whether they have been respected. He monitors the legality of the investigation and detention.[72] Anything that goes beyond this conception of legal assistance in this phase is regarded as an undue imbalance in favour of the suspect. Even if some improvements were achieved through the reform of the *garde à vue* system and through the influence of the ECtHR's jurisprudence, there is still no room for the development of active participation for the defence lawyer in the ongoing investigation and in the formation of the *dossier*.

The role of the defence changes once the criminal proceedings reach the instruction stage and a suspect is *mise en examen* by an investigating judge. This moment marks a turning point at which the defence can play a more active role. During the *instruction* the defence lawyer is granted access to the *dossier* putting him in the position to develop a more informed defence strategy with his client responding to the evidence gathered against him. However, the period of time between the arrest of the suspect and the moment at which his lawyer can have access to the *dossier* affects the effectiveness of his counsel, particularly in relation to statements that the suspect might have given before the counsel intervened.

Finally, the trial stage demonstrates a more "adversarial" understanding of the defence's involvement. Full disclosure of the case file and an exchange of the lists of witnesses allows each party to have a clear picture of the material gathered and of the other side's strategy.

6.4 Structural imbalance

The examples discussed show that the defence counsel's involvement in criminal proceedings in general, and in disclosure in particular, may take different forms. However, what seems to characterise the systems analysed is that the defence's position in criminal proceedings is at a disadvantage in comparison to that of

70 Article 391 *octies* CPP.
71 Article 391 *nonies* CPP, article 327 *bis* CPP and article 430 CPP. The preventive investigative activity is limited to those acts that do not require judicial authorization.
72 This function was particularly important when the *garde à vue* regime did not contemplate the possibility for the lawyer to assist at the questioning of his client.

the prosecutor who, directly or indirectly, represents the public interest and enjoys considerable resources in the execution of his functions. Furthermore, the prosecutor directs and supervises, or at least benefits the investigation carried out by the police. These are benefits that the defence does not enjoy. In international criminal proceedings this imbalance is even clearer. The effectiveness of the defence's investigations is affected by a lack of resources, the difficulties in securing states' cooperation as well as access to the crime sites where a conflict occurred or may still be ongoing.

In the light of the above what is the function of the defence's disclosure? We have seen how the classic common law approach to the defence's disclosure is somewhat limited, perhaps even non-existent. This approach has been blurred in favour of more robust disclosure obligations for the defence. The defence's disclosure in its broadened form appears to pursue a more open disclosure in which the prosecutor gains a more or less clear idea of the defence's case. This approach, unlike the one envisaging limited disclosure from the defence, does not redress the structural imbalance that exists between prosecutor and defence.

One may wonder whether, in the light of the trend described above in the regulation of disclosure, a scheme based on a case file containing the result of both parties' investigations which would be accessible to the prosecutor and the accused equally and from an early stage would not be a more suitable option for addressing the defence's difficult position. I will return to this point in the final part of this chapter

7. Disclosure and the judiciary

There are two main conceptions of the role that the judges can play in criminal proceedings: a passive umpire and manager of the proceedings. The discerning element that may lead to one or the other model is the extent of the authority and powers granted to the judges to actively direct and participate in the proceedings.

The relationship between the judges and the disclosure of information has several implications. First, the judges may monitor the disclosure of evidence by the parties. Second, they may solve disputes between the parties concerning disclosure matters. Third, they can be the recipients of disclosure. Finally, the judges have the important function of dealing with disclosure violations by the parties, to determine their impact on the fairness of the proceedings and to establish the adequate remedy or sanction.

This subsection compares the diverse approaches of the systems investigated to the function of the judges in criminal proceedings, highlighting the different interactions between the judiciary and the disclosure process.

7.1 Role of the judge: passive umpire or manager of the proceedings?

7.1.1 The passive umpire approach

The English criminal system envisages the judge as a passive arbiter. However, even in this deeply rooted common law system significant developments broadened the judicial power in criminal proceedings. This trend has implications on the disclosure process. The domestic acknowledgment of the necessity to vest judges with more ability to manage the case was caused by concerns related to the fairness of the proceedings. Moreover, the cost in terms of time and money of the disclosure process as well as the significant number of documents it generated was a concern that helped move the process in this direction. Another factor which contributed to the advancement of a more involved judge was the jurisprudence of the European Court of Human Rights which criticised the English criminal procedure on more than one occasion.

As for the domestic empowerment of the judge, the recent assessment of the disclosure process in criminal cases carried out in 2011 at the request of and for the Lord Chief Justice is of interest. This review was prompted by concerns over the operation of the disclosure regime contained in the CPIA as amended by the CJA. The review envisaged a "robust management of disclosure matters" by the judiciary as an essential contribution to the improvement of the disclosure process. Specifically, judges should be prepared to give guidance for the prosecution on disclosure earlier as well as excluding material from the trial that was disclosed too late.[73] The review found "considerable attraction" in the early judicial guidance for the prosecutor's disclosure.[74] Moreover, it anticipated that late disclosure by any of the parties "may be capable of resulting" in the exclusion of evidence from the proceedings.[75]

The Strasbourg Court on its part emphasised the cardinal role of the judiciary in relation to disclosure; particularly where the right of the accused to the disclosure of favourable material must be assessed against competing public interests. Specifically, the Court stressed that the "procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the requirements of Article 6 (1)".[76] It is the trial judge who holds the best position to make such assessment as he is "versed in all the evidence and issues of the case". [77]
The involvement of the judiciary in the prosecutor's decision to withhold material from the defence on public interest grounds was the crucial element in assessing

73 Review of Disclosure in Criminal Proceedings, Lord Justice Gross, September 2011, Annex D, paras. 13-14. On the issue of managerial judging, see also the Criminal Procedure Rules 2014, which envisage that the court must actively manage the case. This includes, *inter alia*, achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case and ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way.
74 Review of Disclosure in Criminal Proceedings, Lord Justice Gross, September 2011, p. 9.
75 Ibid.
76 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000, para 63.
77 Ibid. at para 65.

the compliance of the criminal procedure with the Human Rights Convention. In the cases of *Jasper v. the United Kingdom* and *Fitt v The United Kingdom*, the Grand Chamber of the Strasbourg Court, albeit by a small majority, stressed the importance of the role of the trial judge in the evaluation of the relevant material whose non-disclosure was pursued. The fact that the prosecutor had made his *ex parte* application to the trial judge was deemed an essential factor in the assessment of the fairness of the procedure. The defence's interests were safeguarded by the impartial role of the trial judge called to examine the nature and the relevance of the evidence the defence intended to present, which the prosecutor intended to withhold. The Court moved the judge to a more central and involved position in the disclosure process.

Despite the classical adversarial conception of the judiciary, the English criminal procedure shows that a disclosure process regulated by complex and technical provisions requires more robust case management of disclosure by the judge. The judicial involvement in the disclosure process seems to have two goals. The first is to give order to the disclosure process indicating the timing of the parties' obligations and ensuring their engagement in the process. Judges with case management skills and the necessary determination to take charge of disclosure matters, make a remarkable difference to the effectiveness of the disclosure process. The second goal is to supervise the prosecutor's assessment of the material in its possession, which is an important safeguard for the accused's rights. This is particularly relevant in situations where the balance between disclosure and a competing interest such as, for instance, the public interest must be struck, as ultimately this exercise determines what will be disclosed to the defence.

7.1.2 The active judiciary approach

Interesting developments (or lack thereof) in the role of the judge in criminal proceedings can be observed in the Italian criminal procedure. Even though the Italian criminal system departed from its longstanding inquisitorial criminal procedure, it did not abandon the judicial activism that characterised it. Due to its procedural structure the judicial involvement in the proceedings, which begins at a rather early stage, is characterised by different judicial figures and it is shaped by different parts of the proceedings. The Italian criminal procedure in fact, can be roughly divided into three stages: the investigation, the preliminary hearing and the trial. In each of these phases the judiciary retained powers to act and intervene.

The prosecutor's activity during the investigation is somewhat monitored by the judge for the preliminary investigations whose role is important in relation to the rights of the suspects who might be unaware of the investigation until it come to an end. Therefore, it is the preliminary investigation judge and its supervisory function that safeguards the suspect's rights. If the prosecutor considers it necessary to adopt measures that impinge on the individual freedom or privacy of the suspect (e.g. wiretapping) he cannot proceed *motu proprio* but needs to submit a request to the judge for the preliminary investigation. Furthermore, the judge for the preliminary

investigation ensures that the prosecutor abides by the time limits set by the code on the length of the investigation.[78]
Following the prosecution's request for committal, the so-called preliminary hearing takes place before a judge. The preliminary hearing judge cannot be the same judge who sat on the bench for the preliminary investigation.[79] The accused is notified of the hearing and can participate by putting forward his arguments countering the prosecutor's request. The judge analyses the investigation *dossier*, hears the accused and assesses the strength of the prosecution's case in order to decide whether the case should be referred to trial. If he cannot reach a decision on the basis of the information provided he can order further investigations by the prosecutor on the points he considers necessary of more in depth investigation.[80] The judge for the preliminary hearing can also introduce *motu proprio* the evidence he believes indispensable.[81]

As far as the trial stage is concerned, the Trial Chamber is vested with significant powers in relation to the production of evidence. Article 507 of the code of criminal procedure, in fact, states that the trial judge, once the parties have presented their evidence and when it is "absolutely necessary" can *sua sponte* decide to get more evidence. This provision clearly derogates from the adversarial principles showing a certain reluctance to abandon the traditional judicial activism completely. The Supreme Court clarified that the evidence that the trial judge can admit *motu proprio* includes the evidence that for any reason has not been discovered by the parties through article 468 of the code of criminal procedure. Moreover, the judge can also do so when upon request of the party that did not discover the evidence in due time.[82] This is supplementary to the parties' power to introduce evidence but it is not uncommon.[83]

A similar trend, although from a different starting point (an adversarial procedure), can be detected in the ICTY's criminal procedure which was initially was common law based and, as such, envisaged the judges of the Trial Chambers as arbiters of the contest between the Prosecutor and the Defence. The judges had scarce ability to influence the course of the proceedings, the chambers were unaware of the facts of the case pending before them prior to its commencement and the evidence at trial was mainly oral.[84] These characteristics of the procedure also hampered the effectiveness of the few provisions granting the judges some inquisitorial power. For instance, the judges' powers to question a witness (envisaged by Rule 85 of the RPE) was defeated in its purpose as the bench had no previous knowledge of the case and, consequently, its capacity to ask meaningful questions was rather limited.

78 Articles 405-407 CPP. The prosecutor is required to complete the investigation within six months (one year for certain crimes related to criminal organizations) from the registration of the notice of the crime in the registry of the notices of crimes. He can apply to the GIP for an extension of time. Such an extension may be granted for up to 18 months or, in exceptional cases, two years.
79 Article 34 CPP.
80 See Article 421 *bis* CPP added by Law n. 479/1999
81 See Article 422 CPP amended by Law n. 479/1999.
82 Corte di Cassazione Penale, Sezioni Unite, sentenza 6 Novembre 1992.
83 Corte Costituzionale, sentenza n. 111/1993.
84 See Cassese A., *International Criminal Law*, Oxford University Press, 2003, p. 385 and Langer M., *The Rise of Managerial Judging in International Criminal Law*, American Journal of Comparative Law, Vol. 53, n.4 (2005), pp. 835-909.

As Judge Antonio Cassese put it "it became clear fairly soon that, to expedite proceedings which, being grounded on the adversarial model were rather lengthy, it was necessary to depart from the system whereby the court acts as a referee and has no knowledge of the case before commencement of trial, and even during trial only becomes cognizant of the evidence offered by the parties".[85] Iain Bonomy, a British ICTY judge, concurred affirming that "it is a simple fact of life that adversarial proceedings can tend to lack focus and can lead to lengthy, unproductive and largely irrelevant exchanges between examiner and witness...In the absence of judicial control....it is plain that the conduct of war crimes trials in classical adversarial form results, and inevitably will result, in the proceedings in some cases lasting for several years".[86]
Therefore the passive umpire model of adversarial tradition in the context of complex international criminal proceedings was not sufficient to ensure their fairness and expeditiousness.

The subsequent amendments to the Rules of Procedure and Evidence moved in the direction of vigorous judicial management. The establishment of a pre-trial judge, appointed by the president of the Chamber from among its members, aimed to ensure a more efficient regulation of the pre-trial stage. The pre-trial judge adopts any measure necessary to prepare the case for a fair and expeditious trial among which the redaction of a work plan containing the obligations that the parties are required to fulfil in the pre-trial stage and the relative deadlines. These obligations also include duties to disclose. Moreover, after the parties have complied with their obligations the pre-trial judge shall submit to the Trial Chamber "a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule".[87] This file, which is reminiscent of the dossier of inquisitorial tradition, gives the Trial Chamber knowledge of the case before its commencement, assisting the judges in their increased involvement in the proceedings.

Furthermore, the Trial Chamber was given considerable power to reduce the length of the prosecutor's and defence's cases. It may determine the number of witnesses each party is allowed to call as well as the time within which they must complete the presentation of their case. Moreover, the Trial Chamber can request that the Prosecutor reduce the number of counts in the indictment and may limit the number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor.

Concluding, the amendments to the RPE removed many of the adversarial features of the judiciary's configuration that had proven unfit to run war crimes trials. They granted the judges wide judicial control over the proceedings following the pre-trial stage. The appointment of a pre-trial judge allowed the Tribunal to ensure,

85 Cassese, above n. 84 at p. 385.
86 Bonomy I., *The Reality of Conducting a War Crimes Trial*, Journal of International Criminal justice, 5 (2007), p. 349.
87 Rule 65 *ter* (L)(i) e (ii)

from the onset, that a case is focused on the most relevant issues raised in the indictment.

7.1.3 The ICC approach

The analysis of the ICC criminal procedure appears to show a further development in the judge's role. The procedural system envisages a clear separation between the pre-trial and the trial stage. More specifically, three different stages can be detected in the ICC procedure: the investigation, the hearing to confirm the charges and the trial. This tripartite structure bears remarkable resemblance to the Italian procedure discussed above.

The creation of the Pre-Trial Chambers is an interesting feature of the ICC legal system which has significant implications for the disclosure process. The Pre-Trial Chamber discharges an active function during the investigations. Among other things it issues orders and warrants, provides for the protection of victims and witnesses and authorises the Prosecutor to take specific investigative steps within the territory of a State Party without having previously obtained the cooperation of that state.[88] Moreover, if the PTC believes that the Prosecutor has failed to secure a unique investigative opportunity to gather evidence favourable to the Defence, the Pre-Trial Chamber may take the necessary measures on its own initiative.[89]

In other words, the Pre-Trial Chamber monitors and supervises the Prosecution's performance during the investigations in line with an inquisitorial judicial tradition. As noted by Boas, the role of the Pre-Trial Chamber can be compared to the function of the preliminary investigation judge envisaged by the Italian Criminal Code.[90]

It is noteworthy in this context that the Pre-Trial Chamber supervises, to a certain extent, the Prosecutor's discretion in assessing the exculpatory nature of the material in his possession. However, the Chambers can only act at the parties' behest which therefore limits the effectiveness of their powers. It is up to the Prosecutor to request the hearing (under Rule 83) to have a Chamber rule on the exculpatory nature of certain material and his discretion appears immune from scrutiny.[91]

The hearing to confirm the charges was an unknown feature in international criminal law before the adoption of the ICC Statute and RPE. For the purpose of disclosure in preparation to the confirmation hearing the Pre-Trial Chamber may issue orders and take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest (or a summons to appear) has been issued.[92]

88 ICC statute, Article 57(3).
89 ICC Statute, Article 56(3).
90 Boas G., *Comparing the ICTY and the ICC: Some Procedural and Substantive Issues*, Netherlands International Law Review, Volume 47, December 2000, p. 283.
91 Caianiello M., *Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?*, International Criminal Law Review 10 (2010) 23-42, p. 30.
92 ICC Statute, Article 61(3) ; ICC RPE, Rule 121(2).

When the proceedings reach the trial stage the Trial Chamber is engaged in the disclosure process. Rule 84, headed "disclosure and additional evidence for trial", invests the Trial Chamber with the comprehensive authority to make any necessary orders for the disclosure of documents or information not previously disclosed. Such orders can be made to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings.[93]

Regulation 54 of the Regulations of the Court states that in preparation for trial (at a status conference) the Trial Chamber may issue orders on, *inter alia*, "the production and disclosure of the statements of the witnesses on which the participants propose to rely" and "the disclosure of evidence".[94]

Moreover, the judges of the Trial Chamber have the power to order, prior or during the trial, the production of additional evidence as well as to demand the attendance and testimony of witnesses and production of documents and other evidence.[95]
This provision allows the judges to intervene in the proceedings when they consider it necessary to complete the picture with further elements not presented by the parties. The judges may add to the evidence when they deem it necessary in order to unveil the truth in relation to the crimes the accused is charged with. This power has a clear inquisitorial flavour reflecting a conception of the proceedings which goes beyond the simple contest between the prosecutor and the accused.

In the light of the above it appears that the ICC seems to have learned from the ICTY's experience insofar as its legal framework foresees a more active and earlier involvement from the judiciary in the organisation of the disclosure process.

7.1.4 Remarks

From the comparison of the differing role of the judiciary in several different procedural systems it appears that the judge's active participation (at every stage of the criminal proceedings) is the preferable way to improve the disclosure process. Also in relation to this issue it is remarked that one judicial system (Italy) which intended to move towards an adversarial procedural model did not abandon the judicial activism which characterised the inquisitorial former procedural structure. Meanwhile an international criminal system (ICTY), which was born adversarial, amended its procedure to introduce judicial activism for the purposes of case management to deal with the excessive length of its proceedings.
Finally, drawing from the ICTY's experience the ICC established Pre-Trial Chambers that enjoy a supervisory role over the prosecutor's performance and have significant powers in relation to disclosure with the aim of ensuring the proceedings are on the right track from the very beginning. The Pre-Trial Chambers present interesting

93 See also ICC Statute, Article 64(3)(c).
94 Regulation 54(f) and (l) of the Regulations of the Court.
95 ICC Statute, Article 64(6) (b) and (d). This provision is similar to the provision of article 507 of the Italian criminal procedure discussed above.

potential in relation to disclosure in general and disclosure of exculpatory material in particular.

As far as disclosure is concerned, criminal procedures that regulate disclosure through technical procedural rules and/or provisions require more robust judicial supervision of the process. There appears to be a paradox as common law systems embrace this kind of regulation of disclosure regulation but see the judge as an impartial and passive arbiter.
However, particularly in complex international criminal trials, early and far reaching judicial participation brings order to the disclosure process and provides a safeguard for the suspect's rights.
These considerations will be elaborated in the final part of this chapter.

7.2 Consequences of disclosure violations

A fundamental function of the judiciary is to ensure that the parties abide by the procedural rules in place, or, to put it differently, that the players play by the rules of the game. This duty bears important implications in relation to disclosure violations. However, the comparison shows that not every system sanctions violations of disclosure obligations strictly and that even following repeated violations a remedial approach can be preferred to a sanctioning one. It also emerges that the preference for this approach in certain systems is not dictated by the provisions of their legal instruments but rather by a judicial inclination.

In the Italian criminal procedure Article 468 CPP foresees the inadmissibility of the testimony not included in the list or included in a list whose deposit infringed the "seven days" deadline. Furthermore, a testimony can be declared inadmissible, *ex officio*, by the judge when the list does not mention (or it mentions them only vaguely), the circumstances that will be covered by the testimony, or does not indicate the names of the witnesses. The sanction does not affect the list but the subsequent request for the admission of evidence at trial.[96]

However, when one of the parties has their evidence rejected on the above grounds, the criminal procedure code envisages a "safety net". Article 493 CPP, second paragraph, states that the acquisition of evidence not listed ex article 468 CPP is permitted when the party that is requesting its admission, proves that it could not indicate it on time. The rather lenient wording of this provision leaves ample room for the admission of oral evidence not previously disclosed to the other parties. In this case the other party has the right to obtain the suspension of the trial.

Moving to the international plane, we have seen that the ICTY Rules of Procedure and Evidence provide the judges with the power to impose sanctions in response to disclosure violations. Rule 68 bis was adopted in 2001 and states that "the pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either

96 Article 493 CPP.

party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules". This provision does not indicate what kind of sanctions can be imposed nor the specific circumstances that should trigger their adoption.[97] Moreover, the Rule does not go into detail as to the nature of the sanctions it envisages. It is therefore left to the judges' discretion to single out the remedies they consider appropriate for a particular disclosure violation.
The Appeals Chamber emphasised the judges' discretion in the adoption of possible sanctions and made it clear that a Trial Chamber could not be considered to have abused this discretion when it did not impose any sanctions on the Prosecutor for its disclosure violations.[98]

The ICC judicial system does not explicitly provide remedies or sanctions for non-disclosure. Only Rule 122(8), in relation to disclosure in preparation for the confirmation hearing, stipulates that the Pre-Trial Chamber does not take charges and evidence presented into consideration after the time limit has expired. The adoption of measures in response to disclosure violations has been left to the discretion of the judges whose role, also in this procedural system, is crucial in relation to this issue. The judges' approach is to assess to what extent a disclosure violation affected the fairness of the proceedings in order to evaluate the suitable measure to be adopted.

For instance, the *Lubanga* case confronted the Trial Chamber with significant problems regarding disclosure. We have seen that the Prosecutor had recourse to confidential agreements when gathering the majority of the material in his possession rather than using it for the purpose of generating new evidence, as the rule stipulates. Consequently he was in the problematic position of not being able to disclose potentially exculpatory material to the Defence nor to the Chamber. Faced with this situation the Trial Chamber concluded that there was no prospect of a fair trial and ordered a stay in the proceedings.

The remedy of a stay in the proceedings is not contemplated in any ICC legal instruments but was derived from the inherent powers of the Court and developed by its jurisprudence.
The judges emphasised that before resorting to the drastic remedy of a stay in proceedings a Trial Chamber must first use tools within the trial process itself to try to cure underlying obstacles to a fair trial and to allow the trial to promptly proceed to a conclusion on its merits.[99] Only when the Chamber considers that a fair trial has become impossible is the resort to a stay in proceedings appropriate. In reaching this conclusion the Chamber enjoys a certain margin of appreciation based on its "intimate understanding of the process".[100]

97 See Zappala' S., *The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, Journal of International Criminal Justice 2(2004), 620-630, p. 627.
98 See *Prosecutor v. Stakić*, IT-97-24, AC, Judgment, 22 March 2006, para. 190.
99 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, para. 55.
100 Ibid. at para. 84.

The imposition of a stay in the proceedings with a subsequent order to release the accused is a strong response to disclosure violations. The ICC reaction to severe disclosure violation appears more vigorous than that of the ICTY. However, the difference is less clear when we consider that the TC imposed a provisional stay in the proceedings which was lifted once the Prosecutor had complied with his disclosure obligations.[101] The Trial Chamber did not order the discontinuance of the proceedings. The measure adopted seems to have therefore had the aim of offering the Prosecutor the possibility to bring the trial back to a point of fairness rather than sanctioning him for his grave misconduct. This approach resembles the ICTY's preference for a remedial rather than a sanctioning approach.

7.2.1 Remarks

We have touched upon the difference between the conflict solving and policies implementing proceedings.[102] In conflict solving proceedings procedural violations such as non-disclosure or delayed disclosure are tackled with procedural sanctions which may lead to the exclusion of the evidence affected. Concerns that the imposition of such a sanction may jeopardise the prospects of reaching a verdict on the guilt or innocence of the accused are irrelevant. In other words, the respect for the rules is of the utmost importance in these criminal proceedings. In contrast, in policies implementing proceedings, reaching the conclusion of the proceedings is a value *per se* which must be safeguarded. Therefore procedural violations must be addressed but not at the cost of the proceedings coming to a premature end.[103]
Systems where criminal proceedings are intended as a contest between two parties are more suited to accomplishing the goals of a conflict-solving model.[104] Alternatively, procedural systems where proceedings are based on and structured around an official enquiry reflect a policy implementing approach.[105]
However, it is of interest to note that systems supposedly based on or leaning towards an adversarial procedure use an approach to sanctions of procedural violations typical of the policy implementating model of proceedings rather than to the conflict solving one.

The importance of codified procedural sanctions should not be underestimated. Disclosure violations can undermine the fairness of the trial bearing severe consequences for the accused as well as for the credibility for the justice system as a whole. Sanctions have a twofold goal as they attach consequences to the violation of the procedural rules and deter future violations. I will return to this aspect in the final paragraph of this chapter.

101 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 94.
102 Damaška, above n. 45
103 Caianiello, above n. 91 at pp. 24-25.
104 Swart B., *Damaška and the Faces of International Criminal Justice*, Journal of International Criminal Law, 6 (2008), pp. 87-114.
105 Ibid.

8. **Summary and concluding remarks on the comparative analysis**

At the end of the comparative analysis of the main features of the regulation of disclosure in the national and international criminal procedural systems it is possible to summarise the main findings and to make some final remarks.

The regulation of disclosure in criminal law systems may be implemented in different ways. The common law/civil law divide, although their pure forms are absent from modern criminal procedures, are useful for depicting the two main approaches for achieving disclosure.
Common law systems present a complex disclosure mechanism articulated in different stages that requires the full engagement of the prosecutor and the defence on which the effectiveness of the system depends. This disclosure process begins with the prosecutor's disclosure, followed by the defence's disclosure and by further disclosure by the prosecutor. The system is regulated by complex and technical rules and provisions and it leaves ample room for litigation between the parties.
The inquisitorial approach to disclosure is based on the creation of the dossier or case file in which the material gathered during the preliminary investigation is found. The central element of this approach is the investigating judge's impartiality whose investigation focuses on the discovery of the truth and therefore also on exonerating circumstances. In inquisitorial systems disclosure coincides with the defence's access to the case file which can be more or less restricted depending on the stage of the proceedings. In the case file approach it is essential that the material that will form part of the dossier is properly regulated as its composition may be different depending on its purpose; whether it is for the confirmation of the charges or in preparation for trial.

In addition to these methods for achieving disclosure the research showed interesting procedural transplants where elements of one legal tradition have been imported into a procedural structure based on the other. For the purposes of this research procedural hybrids are interesting as they allow the investigation of the possible interaction of elements of different legal traditions in order to achieve a more efficient disclosure process. However, it is noted that a procedural transplant is a risky exercise which does not always give rise to the best result.[106]

The investigation conducted showed that disclosure is an all-present issue that runs through all stages of criminal proceedings. It plays a role in the pre-trial stage in relation to arrest warrants and indictments insofar as the supporting material may be the object of disclosure for the purposes of challenging the arrest or arguing against the confirmation of the charges. Moreover, it clearly comes into play at the trial stage in relation to the material that forms part of the prosecution and, to a certain extent, of the defence's case. Furthermore, disclosure also remains relevant after the trial stage throughout the entire proceedings in relation to exculpatory material, for example.

[106] In relation to Italy see Grande, above n. 51.

However while disclosure matters may be present at every stage of criminal proceedings the scope of disclosure can vary according to the different juncture of the proceedings. For instance, while non-disclosure of the identity of a witness may be granted in the pre-trial stage such information will be disclosed in the preparation for trial. Similarly, access to the case file can be restricted during the investigation and postponed to a later stage.

In relation to the subject matter of disclosure, the study showed that it is not limited to evidence in its classic sense of material presented during trial and turned into evidence but it also covers material and information which has not yet become evidence as well as material and information which ultimately will not become evidence but is nonetheless relevant to the defence's case. The findings of a criminal investigation form part of the facilities within the meaning of article 6(3)(b) of the European Convention on Human Rights.[107] In principle, all material collected during the investigation should be the object of disclosure to the defendant as long as it is relevant for the preparation of his defence (unless competing interests conflict with full disclosure). The Strasbourg Court clarified this principle stating that "if the element in question [collected by the authorities] is a document, access to that document is a necessary facility" if it concerns an act for which the defendant is accused. [108]

Another interesting aspect of the regulation of disclosure concerns the legal instruments adopted by a system to implement it. In the absence of codification, common law systems present a multitude of texts, guidelines, regulations, manuals and protocols to guide implementation of disclosure practices in criminal proceedings. This approach appears confusing particularly in light of the fact that the disclosure scheme employed is already complex. Another instrument which plays a role in the regulation of disclosure is the jurisprudence concerning litigation over matters of disclosure which, as mentioned above, is significant in common law systems. The jurisprudence is of assistance in indicating the right disclosure practices.
The adoption of one single code, such as a code of criminal procedure, containing the provisions to be followed when carrying out disclosure obligations seems preferable insofar as it confers certainty and clarity to the operation of a complex procedural matter.

Disclosure is also a tool used to enhance the principle of equality of arms in systems where there is a structural gap between the prosecutor and the defence in terms of available resources. The European Court of Human Rights considered non-disclosure as affecting the overall fairness of a criminal trial through the principle of the equality of arms.
Bearing this in mind, the analysis conducted showed a tendency to increase the strength and frequency of obligations to disclose incumbent on the defence in common law procedural frameworks.

[107] *Jespers v. Belgium*, European Commission of Human Rights, no. 8403/78, 14 December 1981, para. 56.
[108] Ibid. at para. 58.

This appears to clash with a legal tradition that regarded the defence's disclosure obligations as limited or even non-existent. Limited defence disclosure obligations in fact, compensate for the disadvantaged position of the defence which cannot count on the same investigative abilities enjoyed by the Prosecutor. It is therefore through the disclosure of the prosecutor's material that the defence's position can be brought more in line with that of the prosecutor whereas broadened defence disclosure obligations fail to redress this structural imbalance.

Moreover, this trend seems to reflect a change in the understanding of disclosure which moves away from being a tool to redress the inequality of the parties to become an instrument for achieving a more open confrontation between them. However, while this approach can function in systems where procedural equality and equality of resources both exist, it appears more problematic when the defence does not have the same resources as the prosecutor in relation to the investigation.

In addition to this, the trend seems to create a dependency between the effectiveness of the prosecutor's disclosure and the defence disclosure insofar as it enhances a mechanism by which the more the defence discloses about its case the more the prosecutor will be able to assess the relevance (for the defence case) of the material in its possession. This dynamic frustrates and changes the function of disclosure in common law systems that use a more open approach to disclosure characteristic of civil law.

Disclosure is a complicated legal issue due to its inherent problem stemming from its literal meaning. In fact, to disclose information implies that such information is not known by the party to which is disclosed. Therefore, disclosure depends on the will of the subject in possession of the information. While the good faith of the parties involved must be assumed, an effective disclosure process cannot rely exclusively on such assumption.
The unsupervised discretion of one party (the prosecutor) to decide what material will be disclosed is dangerous insofar as it jeopardises the effectiveness and transparency of the process as well as the enhancement of the rights of the recipient which in most cases is the defence.
This is also the European Court of Human Rights' position which stated that a procedure whereby the police or the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot be considered as being in compliance with the requirements of article 6(1).[109] In the same sense it held that a prosecutor's individual decision to withhold information, weighing it against the defence's right to disclosure violates the defence's right to due process.[110]
This problematic aspect of the disclosure of information is particularly clear in the Anglo-Saxon management of disclosure where the assessment of the material for the purposes of disclosure is central to the process and the discretion conferred to

109 *Natunen v. Finland*, ECHR, no. 21022/04, 31 March 2009.
110 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000.

the prosecutor is significant.
A consequence of the wide discretion given to the prosecutor is that the system requires him to reconcile conflicting priorities such as building a case against the suspect/accused and safeguarding his interests by assessing the relevance of the material gathered for the defence's case. This construct is unsatisfactory as it puts the prosecutor in a rather uncomfortable position, which can affect the quality of his performance and weaken the safeguarding of the defence's rights.

This consideration leads to the function of the judiciary in disclosure matters. The research proved that the role of the judge is crucial in the disclosure process and that the role appears to have developed and become more incisive and managerial departing from a more passive understanding of this function.
In systems adopting an Anglo-Saxon model of criminal procedure the classic notion of a passive arbiter lost popularity and judges became more active and involved in the management of the proceedings and in the disclosure process. However, while the involvement of the judiciary in disclosure matters helps to safeguard the defence's rights it cannot be a substitute for the defence's participation in the process.

At this point an important distinction must be drawn between judges who are called to decide on the merits of the case and judges who are not. An inquisitorial system envisages the first kind while a common law system envisages the second. The latter has a jury who decides on the guilt or innocence of the accused while the trial judge's function is simply summing up all the evidence that has been presented to the jury. However, also in common law systems a judge may have to decide on an important issue that may have important repercussions on the situation of the accused.[111] In such cases the common law judge should also be protected by the influence that undisclosed material, not seen by the defence, may have on his judgment.
The ECtHR tackled this issue indicating that the trial judge should not be put in the uncomfortable and dangerous position of seeing material, whose non-disclosure is sought by one party, when such material can have an impact on an issue of fact that the same judge is called upon to decide. In the latter scenario, the trial judge's impartiality would be jeopardised by the potential influence of the material showed to him.[112]
This scenario, which presents itself in *ex parte* prosecution applications for non-disclosure where the defence cannot participate, underlines the importance of having an impartial subject who is versed in disclosure matters but foreign to the trial proceedings.
In this context the inquisitorial distinction between a pre-trial and a trial stage with the involvement of different judicial figures appears a viable solution for dealing with disclosure matters throughout the whole proceedings safeguarding the position of the trial judges.

[111] For instance, although under English law entrapment does not provide a defence, the judge has discretion to order the stay of the prosecution if it appears that the defendant would not have committed the offence were it not for the activity of an undercover police officer.
[112] *Edwards v. The United Kingdom*, ECHR, no. 13071/87, 16 December 1992.

An additional and interesting aspect of disclosure is given by the consequences attached to non-disclosure or disclosure taking place too late. This point will be discussed further in the next section, however it can be anticipated that the research revealed a lenient approach towards disclosure violations in criminal systems, such as those of the ICTY and the ICC, whose disclosure process is similar to a conflict solving model of proceedings.[113] This approach is characterised by the preference for a remedy to the violations rather than for sanctioning them in order to ensure that the proceedings continue without problems. In practice this means that disclosure violations tend to be addressed by making concessions to the damaged party. For instance, in cases of the prosecutor violating his disclosure obligations it is common that the defence is granted extra time to assess the material disclosed late or the permission to re-call one or more witnesses.

The findings summarised above show that systems of a common law origin, which adopt a disclosure scheme articulated in different stages, retain this approach to disclosure while adding procedural features of an inquisitorial flavour to their criminal procedure.[114]
The combination resulting from these transplants appears peculiar and seems to indicate that in order to function effectively this disclosure process needs more robust judicial supervision and management, broader disclosure from the defence and a prosecutor also capable of investigating exonerating circumstances and assessing the material gathered through the perspective of the defence.
On the other hand, a procedural system such as France, whose civil law legal tradition is indisputable, has undertaken a process of improving the suspect's procedural rights at the pre-trial stage while maintaining its approach to disclosure based on access to the dossier.[115]
Finally, Italy shows a third procedural approach of an inquisitorial criminal procedure moving towards an adversarial model but choosing to maintain the regulation of disclosure through the dossier approach. Italy in fact did not relinquish the feature and did not fully embrace the common law approach to the disclosure of information.
While in relation to other characteristics of their criminal procedure inquisitorial and adversarial systems appear to be more inclined to procedural transplants and experiments, in relation to disclosure they seem to stick to their chosen long standing approach as if it represented one of the few distinguishing elements of their own legal heritage.
When moving to the international plane similar considerations apply. The ICTY, for instance, adopted significant changes to its procedure inspired by a more inquisitorial managing approach to the proceedings. Nevertheless it did not abandon the regulation of disclosure through a common law procedural scheme.
However, a less conservative approach to the common law regulation of disclosure

113 On the characterization of ICC disclosure rules see Heinze, above n. 36 at p. 516.
114 As noted by Heinze "some authors have detected a slow, gradual convergence especially in the evidentiary processes of Common Law and Civil Law systems". Heinze, above n. 36 at p. 101.
115 Spencer J.R., *Introduction*, in Delmas-Marty M. and Spencer J.R., *European Criminal Procedures*, Cambridge University Press 2002, p. 1, 19. Heinze, above n. 36 at p. 489.

appears to have been embraced by the ICC procedure. This approach lends itself to further discussion, which is developed in the following section.

9. Disclosure in international criminal trials

9.1 Introduction

In this work the ICTY and the ICC have been chosen as representatives of the international criminal justice scene. The ICTY was chosen due to its rather long and comprehensive experience and in view of the significant jurisprudence over matters of disclosure from its trials. The ICC was chosen due to its innovative procedural structure, the relevance that disclosure had already acquired in its proceedings, as well as in the light of its permanent nature making it unique in comparison to other international criminal courts and tribunals.

The ICTY and the ICC were established by the international community through the adoption of UN Security Council resolutions (ICTY), or by the ratification of a treaty (ICC). The determination to reject state immunity and to bring to justice the perpetrators of mass atrocities is channeled into and reflected by the international community's creation of international courts and tribunals. From this perspective we can compare this approach to an activist state model where "the administration of justice provides the state with a vehicle for implementing its policies".[116]

What procedural model can better serve international criminal proceedings and achieve a fair and efficient disclosure process?
This question cannot be answered having recourse to traditional schemes *tout court*. International criminal trials are very peculiar and present characteristics not common to domestic proceedings. Also the analysed jurisprudence of the ECtHR is of limited assistance as it does not have a propensity for one specific procedural structure as the most suitable to guarantee the fairness and effectiveness of the disclosure process. However the research conducted enables several weak aspects of the regulation of the disclosure process in the criminal procedure of the ICTY and ICC to be singled out. In addition, it suggests a possible means of addressing these problems in order to improve the disclosure process in international criminal trials.

9.2 Differences with national proceedings

In my view, the main purpose of international criminal proceedings, just as with national courts, is to determine the guilt or innocence of the accused. By the same token international criminal courts and tribunals, even if not bound directly by international human rights instruments, embrace the respect for human rights as one of their main goals and features.[117]

116 Swart, above n. 104, p. 90
117 For the different positions adopted by scholars on the opportunity to include further goals of international criminal trials (such as for instance the establishment of historical records) see Heinze, above n. 36 at p. 217, footnotes 914-916.

International criminal trials present several unique elements and characteristics that contribute to differentiating them from national criminal proceedings.
First of all, while domestic criminal courts must tackle any kind of crime, the jurisdiction of international criminal courts and tribunals is limited to certain types of crimes such as crimes against humanity, war crimes and genocide (depending on developments on the crime of aggression at the ICC). These crimes are particularly heinous, were committed during or after a conflict, span many years in a vast geographical area and involve delicate political issues. Their magnitude and nature is not comparable to even the most severe crimes prosecuted by domestic courts.

Second, significantly fewer defendants (than in domestic criminal systems) are prosecuted through international criminal proceedings.
Defendants who face international criminal trials are, almost always, high profile military or political figures, while the status of an ordinary person in domestic jurisdictions is utterly irrelevant. These peculiarities must not be overlooked as they raise concerns regarding the smooth conduct of the trial. Political and military leaders through self-representation may be determined to use the platform of their trials to promote their own ideas and campaign rather than to defend themselves against the charges against them.[118] Such attitude unavoidably delays the proceedings and requires vigorous case management by the bench.

Third, international prosecutors cannot count, unlike their domestic counterparts, on the assistance of the police to carry out the investigation. There is no international police force to carry out investigations or to execute the Courts' warrants.
International cooperation and judicial assistance are essential for the effectiveness of the investigations which inevitably present difficulties unfamiliar to the national level. The prosecution in fact must collect evidence in crime scenes where an armed conflict may still be ongoing. In contrast, domestic courts have "the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial".[119]
Fourth, the legal professionals called to act as judges, prosecutors and defence lawyers in international criminal bodies come from different criminal systems with diverse legal traditions.[120] They bring with them their own professional experience and background which can be extremely different from that of their colleagues.

Fifth, while domestic criminal proceedings are run on the basis of well-settled codes of both substantive and procedural criminal law, international criminal law does not present the same consolidated structure. As far as substantive international criminal law is concerned, there is consistency in the definitions of the constituent elements of the crimes embodied in the statutes of the main international judicial bodies.

118 Slobodan Milošević, Vojislav Šešelj and Radovan Karadžić are ICTY examples of this approach to international criminal trial.

119 *Prosecutor v. Dusko Tadić,* IT-94-1, AC, Judgement, 15 July 1999, para. 45.

120 On the recruitement of judges at the ICC and other international criminal courts, see Bohlander M., *No Country for Old Men? – Age Limits for Judges at International Criminal Tribunals*, Indian Yearbook of International Law and Policy, (2010); Bohlander M., *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts*, New Criminal Law Review, 12(4), 2009, pp. 529-542.

In contrast, there is not a unique international criminal procedure applicable to every international or internationalised court or tribunal. International criminal procedure draws from human rights law and domestic criminal laws; it is therefore a hybrid field of law.
What differs in the procedures at the international criminal tribunals and courts is the extent and the scope of what they import from domestic systems. The melting pot in which this results dictates the main features of the criminal procedure adopted which may be lean more or less towards one or the other main legal tradition.

Finally, as far as disclosure of information is concerned, differences stem from the complex nature of war crimes cases as well as the volume of the material disclosed. Disclosure is a major exercise that is "extremely resource-intensive".[121] Furthermore, disclosure in international criminal proceedings, unlike in domestic criminal trials, often involves extensive translation of the documents (at least in relation to the charges and the supporting material) disclosed which must be provided in a language which the accused fully understands and speaks.

9.3 Critical aspects

9.3.1 Introduction

The study conducted revealed a number of weak aspects of the regulation of disclosure in the disclosure regimes of both the ICTY and ICC, which were outlined in the previous sections.
The following subsection does not intend to be exhaustive. Rather, it aims to sum up those problems that appear to be the most pressing in disclosure in international criminal proceedings. It further suggests possible improvements in the direction of a more efficient and defence rights friendly disclosure procedure in international criminal proceedings.

9.3.2 The unrealistic expectations of the Prosecutor's role

The structures of the ICTY and ICC criminal proceedings remain adversarial despite the injection of inquisitorial features into their procedures.

The imbalance between the Prosecutor and the Defence in terms of investigative resources is evident and structural. The defendant will consequently have to rely on the Prosecution's disclosure of material relevant to both the Prosecution's and the defence's case. That makes the Prosecution a source of valuable information for the defence's case. [122]

Both procedural systems expect their Prosecutor to play a double role as he is considered not only a party to adversarial proceedings but also an organ of the

[121] ICTY Manual on Developed Practice, para. 33.
[122] McIntyre, above n. 52 at p. 281.

Tribunal and in general an organ of international criminal justice. The ICTY's jurisprudence went as far as defining him a "Minister of Justice with an overriding obligation of ensuring fairness in the proceedings".[123] The research carried out shows that the Prosecution seems to struggle "to establish the equilibrium between these two characteristics assumed to be achievable"[124] and that the disclosure of information is one of the ambits in which such difficulties appear more evident. It has been remarked that the Prosecutor's inability "to adopt this double character imposed on it suggests that the expectations that the prosecution can function consistently under both hats in criminal proceedings of the nature heard at the Tribunal may be an unrealistic one".[125]
This understanding bears negative implications for the Defence's position in different segments of the Prosecution's disclosure process. The first of these segments is the investigation stage where material that will be subsequently disclosed is collected.

The ICC Statute states that the Prosecutor must investigate all facts and evidence relevant to the assessment of the suspect's criminal responsibility and in doing so incriminating and exonerating circumstances must be investigated equally. As outlined above, this is a step forward when compared to the ICTY Statute where no such obligation appears. However, while the Defence appears to be better served by the codification of the Prosecutor's obligation to investigate all facts and circumstances this is not necessarily sufficient to ensure an effective disclosure process.
From the perspective of a third party the main problem seems to be the merging of inquisitorial and adversarial functions attributed to the prosecutor, which prove difficult to reconcile. It appears unrealistic to expect that, while carrying out investigations which aim to build a strong case against the accused, the Prosecutor may actively search for exculpatory evidence which would weaken his case at trial. In other words, the Prosecution finds itself in the somewhat awkward position of being expected to go against its adversarial character in the attempt to fulfil its inquisitorial task. Damaška's warning about the dangers of mixing procedures for the effectiveness of the fact-finding result also appears applicable to the connotation of the Prosecutor's role in international criminal proceedings.[126]
The Prosecutor's function also leads to concern in relation to the unsupervised assessment of exculpatory material. The concepts of exculpatory and potentially exculpatory material are rather broad and their actual meaning depends significantly on the nature of the specific case in question. The assessment of such material is a crucial point of the procedure where an error may affect the overall fairness of the proceedings.
The above-mentioned struggle between the Prosecutor's "two souls" is one of the issues which can lead, even involuntarily, to disclosure violations. The Prosecutor is put in the position of having to adopt the defence's viewpoint in the assessment

123 Ibid.
124 Ibid. at p. 282.
125 Ibid. at p. 294.
126 Damaška, above n. 45 at p. 852 quoted in Jackson J. D. and Summers S. J., *The Internationalization of Criminal Evidence Beyond the Common Law and Civil Tradition*, Cambridge University Press 2012, p. 140.

of the material in his possession. At the same time he has to bear in mind that he has to build a case to prove the accused guilty. The possibility that the latter may influence the Prosecutor's appraisal cannot be excluded and it is against this background that the lack of effective judicial control over the correct use of the Prosecutor's significant discretion appears unsatisfactory.
It is worth recalling the ECtHR's position on this issue. The Court stressed that the "procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the requirements of Article 6 (1)".[127] It is the trial judge who in in the best position to make this assessment as he is "versed in all the evidence and issues of the case".[128]

Second, non-disclosure may occur because the Prosecutor does not fully understand the exculpatory nature of certain material for the Defence's case.[129] This might be the result of the Prosecutor's professional background and leads to the problem of a lack of training for international criminal law professionals.

An example can illustrate this point. The Prosecutor in the *Furundžija* case, before the ICTY, was informed by his deputy of a failure to disclose a document to the Defence, but only after the closing of the hearings and once judgment had already been given. The document in question was a medical certificate concerning the psychological treatment received by the main witness and victim in the case. The Defence was informed and applied to the Trial Chamber seeking to have that witness' evidence struck out. The Trial Chamber re-opened the case.[130]

What is of interest is what was at the origin of the non-disclosure. The document should have been disclosed as it concerned the psychological trauma suffered by the victim of sexual violence who had appeared as a witness. As such it had the potential to affect the credibility of the Prosecution's evidence. However, the Trial Attorney responsible for the case had decided that disclosure of the medical evidence would have amounted to a gross invasion of the witness' privacy. The decision was taken "in an environment in which one inevitably draws from one's own legal tradition and from a sense of professional responsibility that is very much the product of that tradition".[131] The prosecutor had committed an error of judgment probably influenced by the Canadian jurisprudence where the defendant's interest in disclosure of a third party's medical records in cases of sexual offences was balanced against the third party's right to privacy. In this balancing exercise several factors ought to be taken into account including the dignity, the privacy or the safety of the third party, as well as whether denying disclosure would be a

127 *Rowe and Davis v. The United Kingdom*, ECHR, [GC], no. 28901/95, 16 February 2000, para 63.
128 Ibid. at para 65.
129 Morrissey P., *Applied Rights in International Criminal Law: Defence Counsel and the Right to Disclosure*, in Boas G., Schabas W.A. and Scharf M.P., *International Criminal Justice Legitimacy and Coherence*, Edward Elgar Publishing Limited, 2012, pp. 89-90.
130 *Prosecutor v. Furundžija*, IT-95-17/1, Decision, 16 July 1998. The scope of the re-opening was limited to issue related to the "medical, psychiatric or psychological treatment or counseling that may have been received" by the witness in question. The Trial Chamber did not grant the Defence request to strike out the witness in question.
131 Arbour L., *Legal Professionalism and International Criminal Proceedings*, Journal of International Criminal Justice, 4 (2006), p. 683. Louis Arbour was Chief Prosecutor of the ICTY and ICTR between 1996 and 1999.

reasonable limit to the ability of the accused to prepare his case. Other factors are the society's interest in reporting sexual offences and in encouraging counselling for survivors as well as the effect of disclosure on the integrity of the trial process.[132]

These examples illustrate how the unsupervised assessment of the material in the Prosecutor's possession (for the purposes of disclosure to the Defence) puts the Prosecutor in a rather uncomfortable position, which may lead to mistakes that the public will have difficulty understanding and accepting.

9.3.3 The disadvantaged position of the Defence

One of the critical points of the disclosure regime in international criminal proceedings is the position of the Defence. Besides the above-mentioned structural imbalance in the level of resources available to the Defence it is also at a disadvantage *vis à vis* the Prosecutor in the light of the broadened scope of its disclosure as well as the fact that the Prosecution can request the Trial Chamber's intervention to order further disclosure.

The ICTY's current system of disclosure broadened the Defence's obligations through the procedural rules and through intervention by the judges. The amendments adopted brought the Defence closer to the Prosecution in terms of its disclosure commitments therefore diluting the previously clear difference in the roles played by the parties at trial. This feature creates a link between the scope of the defence's disclosure and the efficacy and completeness of the prosecutor's disclosure. In fact while the timing and nature of Defence's disclosure should not alter the scope of prosecution disclosure[133] in practice the more the Defence reveals its strategy the better the position the Prosecutor will be in to evaluate his material from the perspective of the Defence's case. On this point the ICC Appeals Chamber considered that non-disclosure of certain limited material caused by the "unjustifiably and unreasonable" late disclosure of a line of defence may not *per se* compromise the fairness of the proceedings. It therefore implicitly acknowledged the possibility that the Defence's conduct in the disclosure process may have repercussion on the material it receives from the Prosecutor.
In addition to this, the judicial activism embraced by the ICTY and the ICC further amplified the defence's obligations to disclose, sometimes even beyond the scope of the RPE. We have seen that the Chambers have been willing to intervene in the Defence's disclosure beyond the limited obligations envisaged in order to assist the disclosure process and therefore expedite the trial. On several occasions the ICC Trial Chambers recalled Rule 79(4) which grants the Chambers the power to order the Defence to disclose any other evidence as well as Regulation 54 of the Court which provides the Chambers with the authority to order the production and disclosure of the statements given by witnesses the accused intends to call.
Examples of this judge led approach can be found in several of the ICC's proceedings.

132 Ibid. at p. 682.
133 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, AC, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 53.

For instance, in *Lubanga*, in preparation for the confirmation hearing, the Single Judge ordered the Defence to file in the record of the case and as soon as practicable after the Defence's description of evidence had been filed, the statements given by witnesses it intended to rely on at the confirmation hearing.[134] In *Abu Garda* the Defence was ordered to submit "information as to the proposed subject matter and scope of the prospective questioning of the witness" to the Pre-Trial Chamber.[135] Moreover, in *Katanga* and *Chui* the Trial Chamber remarked that the Defence's decision to challenge the testimony of a Prosecution witness by using documentary evidence triggers an obligation to disclose the documents to the Prosecution in sufficient in advance of the witness' testimony.[136]
It emerges that broadened defence disclosure obligations reduce the difference in scope between the defence and the prosecutor's disclosure affecting the possibility to redress the structural imbalance, in relation to the information available, that exists between them.
Furthermore, the second problematic aspect of the defence's position touches upon the inherent problem of disclosure in criminal proceedings and can be summarised by a question: how can somebody make a request for the disclosure of a specific item of material if he is not aware of its existence or content?

The Defence's ability to challenge the Prosecution's assessment of the material in its possession is limited. Vague requests by the Defence tend to restate the Prosecutor obligations envisaged by the RPE and are often dismissed as "fishing expeditions". However, establishing a *prima facie* case on the existence of the material, its possession by the Prosecution and its relevance to the Defence's case is a daunting task. It is indeed nearly impossible for the Defence, in the absence of an indication or partial disclosure on the part of the Prosecution, to have knowledge of exculpatory material in the possession of the Prosecution.[137]

9.3.4 Disclosure of confidential exculpatory material

Evidence in international war crimes trials is of a unique nature due to the crimes prosecuted as well as to the political context surrounding their perpetration. States that provide documents may have an interest in preserving their confidential nature. Disclosure is not an absolute right and there are competing interests which may arise and need to be taken into consideration in determining whether a piece of information must be disclosed or not. National security is one of the most recurrent concerns linked to the evidence for war crimes trials.
The ICC Statute authorises the Prosecutor to enter into confidential agreements with third parties in order to obtain documents or information for the sole purpose of generating new evidence. This provision is necessary in a context in which the

134 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 17.
135 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Decision requesting the Defence to provide information on perspective witness, 8 October 2009.
136 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, para. 42.
137 Gibson and Lussiaà-Berdou, above n. 56, p. 329

Prosecutor is highly reliant on state cooperation to carry out the investigation. Confidential agreements are essential for the effectiveness of the investigation.
However, it cannot be left to the Prosecutor to evaluate whether potentially exculpatory material should be withheld from the Defence. This provision poses the problem of how to safeguard the Defence's right to disclosure when the Prosecutor is provided with confidential evidence of exculpatory nature and cannot disclose it to the Defence or the Court without the provider's consent. The Court has a limited ability to supervise and prevent misuse of confidentiality agreements to the detriment of the defendant.[138]
This research shows that the safeguards installed to protect the Defence's rights as envisaged by the procedures are not satisfactory. For instance, Article 67 of the ICC Statute stipulates that in case of doubt as to the exculpatory nature of evidence, the Court shall decide. Rule 83 underpins the provision envisaging an *ex parte* hearing at the request of the Prosecutor to rule on exculpatory evidence. However, it is evident that the Court's intervention is possible rather than certain. It is the Prosecution's action that triggers this provision which has its effectiveness hollowed out in case of the Prosecution's inaction. The structure appears to threaten the efficacy of the disclosure process. The potential scenario is that exculpatory evidence gathered or known by the Prosecutor remains hidden from the defendant and the Court.

The disclosure of this material to the judges is a step in the right direction. However, it generates further questions linked to the necessity of not influencing the judges, to the effectiveness of their scrutiny and to the Defence's participation in the process.
Without the Defence's participation in the *ex parte* hearing (concerning material gathered through confidential agreements) the judges will have to monitor the procedure to ensure the protection of the accused's rights. However this seems to come at some cost. It is self-evident that disposing of non-disclosure application involves the access to confidential material, which cannot be shown to the Defence. The Trial judges will see and assess material, which in case of non-disclosure will not form part of the trial and as such will have to be discarded by the judges when reaching their verdict. It is worth recalling that potentially exculpatory material may also include evidence which contains both exculpatory and incriminating circumstances. On this point the jurisprudence from the ECtHR states that the trial judge should not be put in the "uncomfortable position of having to see material and then having to discount it at a later stage of the proceeding". [139]
Moreover it is noted that even if the judges are involved in the assessment of the material in question this is not necessarily sufficient to safeguard the Defence's position; at least according to the ECtHR jurisprudence which stated that in proceedings where non-disclosure is invoked on national security grounds, the judicial review without any of the Defence's adversarial involvement in the procedure is not sufficient to comply with the Defence's guarantees envisaged by

138 See Swoboda S., *The ICC Disclosure Regime – A Defence Perspective*, Criminal Law Forum 2008, p. 468.
139 Dissenting opinions of Judges Palm, Fischbach, Vajić, Thomassen, TsatsaNikolovska and Traja, appended to the *Jasper v. the United Kingdom* and *Fitt v The United Kingdom* judgments.

the Convention.[140] In other words, the judge is not in a position to compensate for the lack of the Defence's participation.
While it is true that international criminal judicial bodies are not bound by the jurisdiction of the ECtHR their instruments contain provisions proclaiming respect for the highest human rights standards. The ICC Appeals Chamber stated (in relation to the possibility for the defendant to challenge his detention) that based on the ECtHR jurisprudence the Defence must, to the largest extent possible, be granted access to documents in order to ensure both the equality of arms and an adversarial procedure.[141]
Doubts remain even when the ECtHR is left aside and a more pragmatic perspective is embraced. Can the Trial Chamber's scrutiny of the confidential exculpatory material be effective? In order to assess whether the non-disclosure of potentially exculpatory material to the Defence would have repercussions on the determination of the guilt or innocence of the accused and therefore impair the fairness of the trial, the Trial Chamber should have a detailed knowledge of the case.[142] This would go against the adversarial nature of the procedure. We have seen that at the ICC the question of the record of the pre-trial proceedings was highly debated in the negotiations and the Rules are ambiguous as to whether the Trial Chamber should have access to those records. But how can the Trial Chamber determine the weight of a piece of information for a case if it has limited knowledge of it?
Against this background improvements in the regulation of non-disclosure of confidential material appear necessary.

9.3.5 The lack of codified procedural sanctions for disclosure violations

"Playing by the rules is a value in itself, and violating the rules may lead to punitive consequences irrespective of the concrete outcomes of the trial".[143] This is a characteristic of the process administration which Damaška defines a "conflicts solving" model where procedural violations are responded to with precise and severe penalties regardless of the fact that this approach may impede the proceedings, preventing them from reaching an end.[144] This type of system is related to the Anglo-Saxon legal tradition and to the accusatorial procedure. In relation to disclosure this is an important principle as well as a concrete safeguard for the accused *vis á vis* the Prosecution's poor disclosure.
However, we have seen through the analysis of the ICTY's jurisprudence how a criminal law system, which is influenced by the common law procedure, does not include a precise system of procedural sanctions for disclosure violations.
The Tribunal's practice shows that the "sanctioning approach" is not the primary

140 *Chahal v. The United Kingdom*, ECHR, [GC], no. 22414/93, 15 November 1996.
141 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-323, Decision on the Defence Request for Disclosure, 27 January 2011, para. 10. The Pre-Trial Chamber quoted the Appeals Chamber's Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of the Pre-Trial Chamber III entitled Decision on application for interim release, 16 December 2008, para. 32.
142 Swoboda, above n. 138, p. 471.
143 Caianiello, above n. 91 at p. 25.
144 Swart, above n. 104. In conflict resolution systems the State would not in principle try to reach any political result, leaving the outcome of the trial dependent on the ability of the parties, in the policies implementation model the State would operate in the opposite direction.

option.[145] In practice the Trial Chambers have felt more at ease in granting the Defence some sort of relief in the form of additional time to study the newly disclosed material or the possibility of re-calling the Prosecutor's witnesses, rather than in imposing sanctions on the Prosecutor or ordering a stay jn the proceedings. In other words, the application of Rule 68 *bis* has focused more on the remedy than on the sanctions.

It is not uncommon to come across statements such as "disclosure practice of the Prosecutor had not been satisfactory"[146] or "the numerous disclosure violations reflected badly on the Prosecution"[147] while analysing the Trial Chambers' assessment of the way in which the Prosecution discharged its disclosure obligations. However, despite the Appeals Chamber's statement that it "will not tolerate anything short of strict compliance with disclosure obligations" reacting timidly to the Prosecution's disclosure violations appears to be common practice at the Trial Chambers.

This is unsatisfactory insofar as recurrent disclosure violations have a negative impact on the "clear and cohesive view" of the Prosecution's case that the Defence should have and on its resources regardless of the specific prejudice suffered in relation to any single episode of non-disclosure or late disclosure. The cumulative effect of multiple disclosure violations cannot be overlooked. Disclosure should be prompt in order to be effective and allow the Defence to prepare and present its case.

The ICC's procedure also leaves the choice of appropriate sanctions to the judges based on the specific violation and on a case-by-case basis. The Rome Statute and the Rules of Procedure and Evidence do not foresee any sanction in case of disclosure. The only exception is the exclusion of evidence disclosed too late in preparation for the confirmation hearing pursuant to Rule 121(8).
Nevertheless in *Lubanga* the Trial Chamber seemed to mark a difference with the ICTY's approach insofar as it ordered a stay in the proceedings when confronted with Prosecutor's non-disclosure of exculpatory material. The Prosecutor had indeed entered into confidential agreements with the UN and other providers which prevented him from disclosing the material to the Defence as well as to the judges. The Trial Chamber considered that the trial process had been "ruptured to such a degree" that it was "impossible to piece together the constituent elements of a fair trial".[148]
However, as discussed, the difference with the ICTY is less evident when we consider that the TC imposed a provisional stay in the proceedings which was lifted once the Prosecutor had complied with his disclosure obligations.[149] The Trial Chamber did not order the discontinuance of the proceedings. The measure

145 *Prosecutor v. Brđanin*, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 23.
146 *Prosecutor v. Orić*, IT-03-68, Trial Chamber Judgment, 30 June 2006, para. 815.
147 *Prosecutor v. Karadžić*, IT-95-5/18-I, Decision on Accused's Motion for New Trial for Disclosure Violations, 3 September 2012, para. 14.
148 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 93.
149 Ibid. at para. 94.

adopted therefore seems to aim towards offering the Prosecutor the possibility of bringing the trial back to a point at which it was fair rather than sanction him for his grave misconduct. As Caianiello puts it "even when applied, sanctions are not meant to hit the party which disregarded its duties, but rather to act as a threat that remains effective as long as the party continues to behave unfairly."[150] This approach resembles the ICTY's preference for a remedial rather than a sanctioning approach or to use Damaška's terms this is a policy implementing approach to procedural violations.

Likewise, the second major disclosure issue that arose in the *Lubanga* case is of interest in relation to the issue of sanctions. The Trial Chamber was faced with the Prosecutor's resistance to disclose the identity of his intermediaries.[151] The latter can be described as *in situ* assistants to the OTP who, among other things, establish contacts with potential witnesses in areas and cultures which often are challenging. The Prosecutor refused to obey the judges' order to disclose to the defence the identity of an intermediary and the Trial Chamber ordered a (temporary) stay in the proceedings.[152] The Trial Chamber noted that "the Prosecutor has chosen to prosecute this accused. In the Chamber's judgment, he cannot be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations".[153]
However, the Appeal Chambers reversed this decision and found that Trial Chamber should have sought to induce the OTP's compliance through the imposition of measures, such as reprimands or pecuniary sanctions, pursuant to Article 71 of the Statute to address the Prosecution's misconduct before resorting to the imposition of a stay.[154] Specifically the AC found that "sanctions under article 71 of the Statute are the proper mechanism for a Trial Chamber to maintain control of proceedings when faced with the deliberate refusal of a party to comply with its orders. Before ordering a stay of proceedings because of a party's refusal to comply with its orders, a Trial Chamber should, to the extent possible, impose sanctions and give such sanctions reasonable time to bring about compliance".[155]

The Appeals Chamber therefore opted for a professional sanction rather than a procedural ones in line with the previous trend.

9.3.6 The amount of litigation over disclosure matters

Finally, the last critical aspect of the current disclosure system in the ICTY and ICC procedures that worth mentioning is the enormous amount of litigation over

150 Caianiello, above n. 91 at p. 39.
151 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Redacted Decision on Intermediaries, 31 May 2010.
152 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU, 8 July 2010.
153 Ibid. at para. 28.
154 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, *AC,* Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010.
155 Ibid. at paras. 3, 61.

disclosure matters that both systems generate.
The adoption of technical and complex procedural rules to regulate disclosure in international criminal trials leaves a significant amount of room for such litigation and the parties do not hesitate to exploit it. Trial Chambers of the ICTY and ICC have been swamped in motions concerning disclosure at the pre-trial, trial and also post-trial stage.[156] This extensive litigation inevitably delays the conduct of criminal proceedings.
On this point it is worth citing an explanation for the inefficiency of the common law approach to disclosure in international criminal trials given by an English Queen's Counsel.[157] He argues that common law provides significant opportunities for defence lawyers to litigate on disclosure matters and that at the domestic level they and the judges know the limits as they have been forged by longstanding practices. In contrast, in international criminal trials there is not such a clear understanding of the limits to this litigation as defence counsel and trial judges come from different legal cultures and "what could work at national level could be a disaster at the international level".[158]

9.4 Possible improvements

Twenty years of ICTY experience seems a reasonable enough time to assess the result of the Anglo-Saxon procedural approach to disclosure in international criminal trials. In addition, the relatively young ICC has already offered an interesting contribution to the discussion through the substantial jurisprudence over disclosure stemming from its first cases.
This study suggests that the current disclosure scheme is too complex and intricate and that it affects the expeditiousness of the proceedings without properly protecting the Defence's right to disclosure.
In the light of the results of the research carried out it is possible to suggest a few possible improvements in the attempt to achieve a more efficient disclosure process in international criminal trials.
The ICC's procedural structure, which envisages the creation of the Pre-Trial Chamber and the hearing to confirm the charges, seems a suitable setting to be taken as the base on which to implement the proposed suggestions.

The unrealistic expectation that the Prosecutor may effectively manage disclosure while reconciling adversarial and inquisitorial souls should be abandoned in favour of a more realistic configuration of its role. It is submitted that the role of the Prosecutor should be revised in an inquisitorial light in order to address the negative implications on the disclosure scheme of its current untenable connotation. The investigation stage and the complex procedural rules regulating disclosure should be reconsidered in order to leave for more substantial judicial involvement in the former and to the adoption of a dossier approach in relation to the latter.

156 *Prosecutor v. Furundžija*, IT-95-17/1, Decision, 16 July 1998.
157 This explanation is quoted in Bitti G., *Two Bones of Contention Between Civil Law and Common Law*, in Fisher H., Kres C. Luder S.R., *International and National Prosecution of Crimes Under International Law*, Berlin Verlag, 2001, pp. 273-288, p. 277.
158 Ibid.

The investigative phase should contemplate the active involvement of a *super partes* judicial organ whose goal would be to investigate in order to find the truth over a specific situation rather than to investigate with the aim of building a case against the suspect. De Hemptinne suggests the creation of investigating chambers to direct the investigations or to confer the power to intervene in the investigtion when the Proseutor refuses to take specific investigative initiatives to existent Pre-Trial Chambers. [159]

While it is true that a newly created investigative body could serve this purpose, this solution would require significant structural changes and considerable financial resources and appears too ambitious and unlikely to be implemented. The second possibility appears more attractive and involves staying within the structure depicted by the ICC procedure and using the Pre-Trial Chamber as the judicial body playing that role.[160]
On this point it is noted that the ICC's procedure already envisages a supervisory/ monitoring role for the Pre-Trial Chamber over the Prosecutor's investigative activity. Specifically, it goes as far as empowering it to intervene, by taking the necessary measures on its own initiative, when it deems that the Prosecutor failed to secure a unique investigative opportunity to gather material favourable to the Defence's case.[161] Taking this provision as a starting point, the proposed approach would represent a major further step in the direction already indicated.
As suggested by De Hemptinne, the Pre-Trial Chamber's investigative powers should be increased in order to guide the Prosecutor's activity rather than limiting its action to supervision.[162] The Pre-Trial Chamber would be fully aware of the investigation and follow their developments through regular updates from the Prosecutor. Furthermore, it would direct the Prosecutor's search ensuring that all lines of enquiry are followed. It would have compulsory powers over the investigative activities and it would be composed of, *inter alia*, professionals specifically trained for these complex investigations. This solution would benefit the Defence which would be safeguarded by the PTC's impartiality and unique function and at the same time would solve the conflict that the Prosecutor experiences in the current system where he must investigate both as an inquisitorial judge and prosecute as an adversarial counsel.

As far as disclosure is concerned, once the investigations are concluded the material gathered could be merged into a case file available to the parties and the Pre-Trial Chamber. As suggested by several authors, the switch to system of disclosure using an open case file could prove beneficial to the efficacy of the process as well as safeguarding the Defence's position in the process.[163] In this context it should be noted that the creation of a record of the pre-trial proceedings is already envisaged by the ICC's procedure. One may wonder whether such a feature could be the first

159 De Hemptinne J., *The Creation of Investigating Chambers at the International Criminal Court*, Journal of International Criminal Justice, 5 (2007), 402-418.
160 Ibid.
161 ICC Statute, Article 56(3).
162 De Hemptinne, above n. 159.
163 Schoun, above n. 33, Caianiello, above n. 91 at 23-42 and Klamberg, above n. 34.

step of an attempt to move away from an adversarial regulation of disclosure towards an inquisitorial one where both parties are granted access to the case file.[164] On this point it is of interest that the solution proposed by Heinze concerning the adoption of the double dossier system employed by the Italian criminal procedure.[165]

This approach would permit the departure from technical and intricate procedural rules of disclosure which can lead to major litigation over disclosure matters. Moreover, it would remove the Prosecutor's unsupervised discretion in the assessment of the material in his possession. The current system in fact, requires the Prosecutor to evaluate the material gathered from the Defence's perspective in order to assess its relevance to the Defence's case or its exculpatory nature. This section of the disclosure process would be avoided by allowing the Defence to assess for itself the material gathered through the investigation.
Therefore, the Defence would have access to the case file of the investigation created by the Prosecutor under the Pre-Trial Chamber's guidance and supervision The results of the Defence's investigations (if carried out) would also merge into the case file. In an ideal world a different Pre-Trial Chamber could hold the hearing to confirm the charges. However, bearing in mind the costs of such a solution it is submitted that once the Pre-Trial Chamber is more involved in the investigation a faster confirmation procedure could be envisaged in order to balance the resources of the Pre-Trial Chambers.

All the motions concerning disclosure would be dealt with by the Pre-Trial Chamber, which being foreign to the trial proceedings, could supervise the disclosure procedure without running the risk of being prejudiced against the accused at a later stage of the proceedings. This approach would spare the Trial Chamber from any contamination with, for instance, confidential material which may ultimately not become evidence and will have to be discarded at a later stage when reaching a verdict. It is noteworthy that in the ICC procedure the PTC already has the power to issue orders concerning disclosure.[166] The Pre-Trial Chamber would dispose of all the disclosure motions filed by the parties not only before the confirmation of the charges but throughout the entire proceedings. Notably, ICC's procedure already envisages the possibility for the Trial Chamber, if necessary for effective and fair functioning, to refer matters to the Pre-Trial Chamber.

On this point, while this approach would probably lessen the amount of disclosure litigation there would still be competing interests to be accommodated. The protection of witnesses and national security concerns play an important role in war crimes trials. The Pre-Trial Chamber would be the consignee of motions seeking non-disclosure on which it could decide being knowledgeable of the material gathered through the investigation and their relevance for the Defence.
Moreover, a system where a judicial body such as the Pre-Trial Chamber is

164 Simon De Smet submits that the ICC Pre-Trial record could be used as a "quasi dossier". De Smet, above n. 35.
165 Heinze, above n. 36 at p. 529.
166 ICC Statute, Article 61(3).

actively involved in the investigations makes it difficult if not impossible for the Prosecutor to enter into confidential agreements that prevent the Chamber from the disclosure of the material (sometimes exculpatory) provided. At the same time, Pre-Trial Chamber's involvement in the investigation does not seem to be a strong deterrent for third parties providers to enter into such agreements. The Pre-Trial Chamber would indeed be bound by the same confidentiality clauses foreseen for the Prosecutor.

On the delicate issue of confidential exculpatory material the approach should be rather strict conceiving its disclosure as the rule and non-disclosure as a very limited exception which should be adequately counterbalanced. If the Pre-Trial Chamber is persistently prevented from disclosing the confidential exculpatory material to the Defence it should order the Prosecutor to drop the charges involving the evidence in question.[167]

Furthermore, the Defence's position in an *ex parte* application for non-disclosure could be improved by the adoption of creative measures. On this issue the English/Canadian solution outlined above envisaging the creation of a special advocate could be explored. A somewhat similar and creative approach was suggested (but not adopted) in the ICTY in the *Blaškić* case where the Defence, while filing a motion for disclosure of exculpatory material, suggested the appointment of an ombudsman who could examine the Prosecution's files in order to assess the exculpatory character of the material in its possession.[168] The creation of a figure not directly linked to the defendant who could participate in such a hearing to guard the defence's interests could improve the fairness of the disclosure process.

In addition to this, the disclosure process could benefit from the adoption of a codified system of procedural sanctions for disclosure violations. This system, not as important but nonetheless useful in the system proposed, would have a deterrent effect and at the same time it would provide certainty and credibility to the entire procedure. Not every procedural violation should be followed by procedural sanctions. However, as stated by Caianiello, disclosure violations, particularly those concerning exculpatory material, should lead to a sanction which produces its effects within the process rather than outside it.[169] In other words, sanctions for a disclosure violation should reflect on the procedure rather than on the subject who committed it. An example of the first is the non-admission of evidence disclosed too late. An example of the second is the imposition of a deontological sanction on the counsel responsible of the disclosure violation as in the *Lubanga* case in relation to disclosure violations pertaining to the identity of the Prosecutor's intermediaries.

Disclosure violations should not automatically lead to extreme consequences such as the non-admission of the evidence in question. There are instances, such as the

167 Swoboda, above n. 138 at p. 470.
168 *Prosecutor v. Blaškić*, IT-95-14, Decision on the Production of Discovery Material, 27 January 1997, para. 51. See Zappala', above n. 97 at p. 132.
169 Caianiello, above n. 91 at p. 25, footnote 3.

late disclosure of information, where additional time is capable of remedying the late disclosure. However, when non-disclosure of significant exculpatory material occurs it seems difficult to envisage any solution other than the withdrawal of the charges to which such material pertains. Let us suppose that an accused stands trial for war crimes and/or crimes against humanity allegedly perpetrated in several municipalities of a specific region/country during an armed conflict. Let us further suppose that in relation to the accused's conduct in one specific municipality there exists clear exonerating evidence that the prosecutor is not in the position to disclose to the defence. Assuming that the judges have access to the material it appears complex to envisage a third option beyond the disclosure of such material or the withdrawal of the charges related to that specific municipality.

One may argue that this is a somewhat Defence friendly perspective. I submit that it is a human rights friendly one. Can we consider proceedings where an accused is found guilty of specific conduct regardless of the ascertained existence of material able to exonerate him from such accusation to be fair?

Finally, it should not be underestimated that "disclosure is only as good as the person doing it".[170] The more or less adversarial or inquisitorial characterisation of the disclosure process loses some importance insofar as the professionals carrying out disclosure will bring their own professional experience and background to the table. It would be desirable to envisage specific training for international criminal law experts before being admitted to practice as Prosecutors, judges or Defence counsel in international criminal proceedings. This step would be easier to take should a unified criminal procedure to be adopted for all international criminal trials.

A unique criminal procedure applicable to international criminal trials would be a welcome step that could contribute legitimacy and coherence to a relatively young field of law avoiding the counterproductive proliferation of different types of criminal procedures at the international level. This procedure should be tailored to the needs and circumstances of international criminal trials. It could draw from the significant experience of international criminal courts and tribunals that indicate what procedural rules can better address such needs. Unfortunately, it is unrealistic to expect that a common international criminal procedure will be established at any time in the near future.

[170] Review of disclosure in criminal proceedings, Lord Justice Gross, September 2011.

SUMMARY

The subject of this work is the disclosure of information in national and international criminal proceedings. Disclosure and the procedure regulating it represent a subject matter in which crime control and human rights find their synthesis. Disclosure is a complex subject that covers different branches of law as it involves aspects of a procedural nature as well as considerations that belong to the realm of human rights law.
Disclosure is also complicated by its inherent imperfection caused by the fact that the system entrusts a party to a trial with the discretion to decide on what to disclose to the other side. It has been characterised as the "battleground of the modern legal system".[1]
The purpose of the study is to scrutinise and evaluate the regulation of disclosure in national and international procedural systems in order to gain knowledge of the different ways in which the disclosure of information can be achieved.
The research project investigates, on a comparative basis, the rules of procedure and evidence regulating disclosure in five criminal procedural systems. Three of these systems are national (England, Italy and France) and two international (ICTY and ICC).
The jurisprudence of the European Court of Human Rights (ECtHR) on the right to a fair trial and, more specifically, on the disclosure of information provides the background against which these systems and their disclosure processes can be assessed.

The comparative analysis singles out and addresses the main critical aspects of the disclosure of information in each procedural framework. This analysis gives account of the different characteristics that the prosecutor, the defence and the judges present in the system scrutinised as well as of the ramifications that these differences bear in relation to the disclosure process. Several questions arise such as: What is the influence that different legal traditions such as common law and civil law exercise on disclosure? What role should the defence, the prosecutor and the judges play in the disclosure process? What judicial supervision, if any, should be envisaged in the disclosure process and at what stage? How can disclosure accommodate competing interests? And what should the consequences of disclosure violations be?
The pattern followed and the order chosen in the redaction of the chapters present the characteristics of a pyramid structure where the analysis of the three domestic legal systems, through the filter of the jurisprudence of the European Court of Human Rights, guides us to the International plane.
Finally, this work attempts to suggest possible improvements for the current regulation of disclosure.

The research, after a brief introduction, is developed in chapters 1 to 8.
Chapter 1 describes and analyses the disclosure of information in the English criminal

[1] Zander M. and Henderson P. (1993) Crown Court Study, Research Study No. 19, Royal Commission.

law system that has been chosen as a representative of the common law tradition in the regulation of disclosure. However, as the research unfolds it becomes clear that, while the disclosure process made up of different stages involving both parties remain a feature of adversarial legal origin, several elements of the procedure of more inquisitorial flavour have permeated the criminal procedure.
The English law on disclosure has been in constant development over the past thirty years. Case law and statutory law have characterised it alternatively more or less narrowly. The process has been compared to a pendulum swinging periodically between more open and more controlled disclosure of unused material.[2]
After the Middle Ages, England developed its criminal system in an adversarial fashion where the disclosure process is regulated by technical procedural rules, involves different stages and relies on the engagement and accuracy of the parties.
From the analysis carried out it emerges that pre-trial disclosure of the prosecution's case and evidence against the accused is a settled and somewhat uncontroversial principle of natural justice. What appears to be more controversial and difficult to reconcile with the adversarial tradition is the prosecution's duty to disclose unused material, which is all the material generated and gathered in the course of a criminal investigation. In addition, the introduction of defence disclosure obligations, has proved difficult to digest for the defence practitioners and its application has been poor.
One of the main critical aspects of the English system of disclosure appears to be the expectation placed on the prosecutor in relation to the assessment of the material in his possession. Specifically, the prosecutor while deciding upon disclosure has to apply a test that, although objective in nature, requires him to assess material from a defence perspective or, in other words, to empathise with his opponent. Upon these premises, the effectiveness of the system depends on the way in which the prosecution handles the conflict between the responsibilities and expectations placed on it and its cultural tradition. This issue also features in the disclosure process of the international criminal systems assessed in chapter 6 and 7.

Chapter 2 describes and assesses the disclosure of information in the Italian criminal law system. The Italian criminal procedural experience is interesting insofar as the criminal procedural system migrated from its deeply rooted inquisitorial legal tradition to a criminal procedure oriented towards and inspired by adversarial principles.
The new characterisation of the criminal law system has important bearings on the regulation of the disclosure of information to the suspect/accused during criminal proceedings.
The study of the Italian criminal procedure on disclosure reveals that, despite the proclaimed migration of the criminal procedure towards an adversarial model, the system did not relinquish several important features of its inquisitorial tradition. For instance the system, being reluctant to leave the truth seeking process entirely in the hands of the parties, maintained a rather strong judicial power, inter alia, in relation to the admission of evidence that, if it is considered necessary can be

[2] David Calvert-Smith QC, The prosecuting authority's role; 'Disclosure under the CPIA 1996: British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.

admitted *motu proprio* by the judges. In addition, the role played by the prosecutor remains closer to the inquisitorial tradition, although the system formally requires him to act as a party on the same footing as the defence. In relation to the disclosure of information, the system preferred to maintain the dossier approach to achieve disclosure. The research also reveals that disclosure assumes different meanings and characteristics in accordance to the stage of the proceedings in which it operates. It is possible to configure two different types of disclosure. An "external disclosure" referring to the information to the relevant person of the beginning/existence of criminal proceedings (although at its embryonic phase) against him and an "internal disclosure" that refers to the material gathered through the investigations and to the evidence the parties intend to present at trial and therefore the essence of the case.

Chapter 3 investigates the disclosure of information in the French criminal law system. France has been selected as a representative of the classical civil law legal tradition in which disclosure is achieved through the suspect/accused access to the dossier in which the results of the investigations conducted by the investigating judge are gathered. A brief description of the roots of the criminal law system facilitates an understanding of the main elements that characterise the modern criminal procedure. An overview of the three main phases of criminal proceedings (police investigation and the prosecution, the judicial investigation and the trial) as well as of their protagonists and their main procedural characteristics allows the singling out of the segments of the criminal procedure in which disclosure plays (or should play) a role. An important element of this chapter is the assessment of how the disclosure of information to the suspect/accused functions with particular attention (also in the context of the garde à vue regime) paid to the right to be informed of the nature of the accusations, the right to have access to legal assistance and the possibility of access to the *dossier*. The research shows that the French criminal law system experienced difficulties in finding the balance between the suspect's right to a fair trial and the inquisitorial pre-trial stage. Disclosure, intended as the suspect's right to be informed of the accusations and the evidence gathered against him, is a concept that seems to conflict with the inquisitorial nature of the pre-trial stage of the criminal proceedings. However, the research revealed that recent changes in the law improved the condition of the suspect detained in relation to the information provided to him. Divergently, the trial stage presents a more "adversarial" characterisation of the rights of the accused. Full disclosure of the case file and the exchange of the witness lists allow each party to have a clear picture of the material gathered and of the other side's strategy. The question is to what extent this openness can be effective when it takes place in the final stage of the proceedings where the *dossier* has already been formed.

Chapter 4 and 5 investigate and describe the European Court of Human Rights (ECtHR) case law on the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights as well as more specifically on the issue of disclosure. The study of the Court jurisprudence allows some of the critical aspects of disclosure to be singled out stressing its solid nexus with human rights law as

well as appreciating the contribution that the ECtHR jurisprudence gave to the development of disclosure in their criminal proceedings. In fact, while the Strasbourg Court does not tell us which is the preferable way to regulate disclosure it tells us which features of the criminal procedure conflict with the right to a fair trial and with the right of disclosure. The jurisprudence of the Court is therefore of assistance in the assessment of the disclosure process in national systems and that is why the procedural systems chosen are all subjected to the jurisdiction of the Court. However, also in relation to the International criminal bodies selected in this work the ECtHR case-law is useful considering that, even if they are not bound by its jurisprudence, their legal instruments enshrine the obligation to respect the right to a fair trial. The research shows that disclosure has been recognised by the Court as an element of the right to a fair trial through different angles of the provisions and principles of Article 6 of the Convention. Moreover, the study of the ECtHR reveals the essential principles concerning several interesting elements of the disclosure of information. Specifically it shed light on the subject matter of disclosure, the relation between the non-disclosed material and the issue of actual prejudice, the managing of the conflict between the right to disclosure and the public interest as well as on the possibility of remedying the lack of disclosure on appeal. This analysis provides a valid tool for assessing the rules regarding the disclosure of information in the national and international criminal procedural systems examined in this book.

Moving to the international plane, chapter 6 assesses the disclosure of information in the legal system of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY Rules of Procedure and Evidence (RPE) initially established a criminal procedure oriented significantly towards an adversarial model. However, this approach to a war crimes trial soon proved unfit to run expeditious proceedings. The adoption of new rules of procedure and evidence and several amendments to the existing rules have marked, since 1998, a departure from the original adversarial orientation of the RPE. The new procedural system features a more active judicial control over the proceedings, which is described as judicial management of the case. In relation to disclosure, the ICTY maintained an adversarial approach based on a process regulated by a set of technical rules. The assessment of the Tribunal's disclosure regime carried out in this chapter showed that the role of the Prosecutor is *sui generis* as he has characteristics which belong to different legal models. He is indeed expected to prosecute as in an adversarial context and at the same time to act as a *super partes* entity of inquisitorial origin. This duality of the Prosecution's functions (envisaged by the Tribunal's jurisprudence) appears to have negative repercussions on the disclosure regime. Moreover, the study highlights other critical aspects of the disclosure practice such as the broadened Defence disclosure; the Prosecution's *in camera* applications for non-disclosure which do not grant a real opportunity to the Defence to make its case for disclosure; the issue of prejudice in relation to Article 68bis sanctions; the Tribunal's practice of not imposing procedural sanctions for disclosure violations and the limited effectiveness of the safeguards envisaged by the RPE in relation to confidential material ex Rule 70.

Chapter 7 scrutinises the disclosure of information in the criminal procedure of the International Criminal Court. The analysis carried out shows that the ICC legal

system established through the adoption of the Rome Statute and the Rules of Procedure and Evidence has been injected with significant inquisitorial elements. However, these elements operate in a context that maintains features of the common law tradition such as the trial hearing in which the parties present their cases and, more importantly, the disclosure of information that is regulated by an clear set of technical rules.
The ICC legal framework grants to the judiciary a position of control over and intervention in the proceedings at both pre-trial and trial stage. The creation of Pre-Trial Chambers (PTC), which is reminiscent of an Italian *giudice per le indagini preliminari,* is an interesting feature as well as the establishment of a potentially adversarial hearing to confirm the charges. The PTC monitoring function over the Prosecutor and its power to ensure that disclosure takes place under satisfactory conditions in preparation for the confirmation hearing reveals an inquisitorial flavour. Significant in this sense is the emphasis placed on the Chamber as the organ designated as having the final word on the exculpatory nature of the material in possession of the Prosecutor. The codified *super partes* role of the Prosecutor during the investigation is welcome when assessed against the developments of his ICTY counterpart. Moreover, the creation of the record of the pre-trial proceedings is another noteworthy innovation that seems to be prone to be developed in the direction of a more open and simplified disclosure process.

Finally, in chapter 8 the comparative analysis is developed summarising its main findings in relation to the disclosure of information in the different criminal procedures investigated. This process provides the indispensable tool for suggesting possible improvements in the current regulation of disclosure.
In this context, particular attention is paid to modern international criminal proceedings as they are relatively new and because of the ongoing debate on the possibility of establishing a single common criminal procedure applicable to all International criminal Courts and Tribunals. The study conducted suggests that the current disclosure scheme is too complex and intricate and that it affects the expeditiousness of the proceedings without properly protecting the defence's right to disclosure.
I argue in favour of the adoption of a more inquisitorial disclosure process in which the investigation stage and the complex procedural rules regulating disclosure should be reconsidered to leave room for substantial judicial involvement in the former and the adoption of a dossier approach in relation to the latter.

SAMENVATTING

Het onderwerp van deze studie is het verschaffen van toegang tot informatie in nationale en internationale strafprocedures. Het verschaffen van toegang tot informatie en de procedurele regeling daarvan betreft een onderwerp waarbij enerzijds het belang van een adequate reactie op strafbare feiten en anderzijds mensenrechten een rol spelen. Het is een complex onderwerp omdat het meerdere onderdelen van het recht bestrijkt. Het onderwerp is tevens lastig door de onbalans die veroorzaakt wordt door het feit dat één van de partijen de beoordelingsruimte is toebedeeld om te beslissen tot welke informatie de andere partij toegang moet krijgen. Daarom is het wel gekarakteriseerd als het 'strijdtoneel van het moderne rechtssysteem'.

Het doel van deze studie is het onderzoeken en beoordelen van de regeling inzake het verschaffen van toegang tot informatie in nationale en internationale strafrechtsstelsels om zodoende kennis te verwerven over de verschillende wijzen waarop die toegang kan worden bewerkstelligd.
In deze studie zijn, rechtsvergelijkend, de strafvorderlijke beginselen en regels over het verschaffen van toegang tot informatie in vijf strafrechtsstelsels onderzocht. Drie van deze stelsels zijn nationaalrechtelijk: Engeland, Italië en Frankrijk; twee zijn internationaalrechtelijk: het Joegoslavië-tribunaal (International Criminal Tribunal for the former Yugoslavia) en het Internationaal Strafhof (International Criminal Court).

De rechtspraak van het Europees Hof voor de Rechten van de Mens (EHRM) over het recht op een eerlijk proces en, specifieker, over het verschaffen van toegang tot informatie geeft het kader waarbinnen de drie nationaalrechtelijke regelingen kunnen worden beoordeeld. Maar ook voor de internationaalrechtelijke stelsels die in dit onderzoek zijn geanalyseerd is de jurisprudentie van het EHRM van belang gelet op het feit dat in deze procedures – zelfs al zijn zij niet aan de rechtspraak van het EHRM gebonden – het recht op een eerlijk proces moet worden gewaarborgd.

De rechtsvergelijkende analyse concentreert zich op de belangrijkste punten van het verschaffen van toegang tot informatie in ieder processueel systeem. De analyse schetst de verschillende kenmerken van de rechtsposities van de vervolgende instantie, de verdediging en de rechters, alsmede de gevolgen die deze verschillende kenmerken hebben in de regeling van het verschaffen van toegang tot informatie. Verschillende vragen rijzen, zoals: wat is de invloed die de verschillende rechtstradities, zoals de Angelsaksische en continentale traditie, hebben op de regeling inzake het verschaffen van toegang tot informatie? Welke rol spelen de verdediging, de vervolgende autoriteit en de rechters in die regeling? Welke vorm van rechterlijk toezicht, indien noodzakelijk, zou een plaats moeten krijgen in de procedure van het verschaffen van toegang tot informatie en in welke fase? Hoe kan bij het verschaffen van toegang tot informatie rekening worden gehouden met tegenstrijdige belangen? Wat zouden de consequenties moeten zijn van schendingen van regels inzake het verschaffen van toegang tot informatie?

De volgorde van de hoofdstukken heeft in zeker opzicht een piramidale opbouw, in die zin dat de analyse van de drie nationale rechtssystemen, ingekaderd door de rechtspraak van het Europees Hof van de Rechten van de Mens, ons naar het internationale vlak brengt. Ten slotte beoogt deze studie aanbevelingen te doen betreffende thans vigerende regelingen die de ontsluiting van informatie betreffen.

In hoofdstuk 1 wordt het verschaffen van toegang tot informatie in de Engelse strafprocedure beschreven en geanalyseerd. Het Engelse stelsel is gekozen als representant van de Angelsaksische traditie. Het centrale kenmerk van de regeling, een proces van verschaffen van toegang tot informatie in meerdere fases waarin beide partijen participeren, is aan een accusatoire rechtscultuur ontsproten. Uit het onderzoek blijkt echter ook dat diverse elementen van meer inquisitoire afkomst in het Engelse strafprocesrecht zijn binnengedrongen.
Het recht op het verschaffen van toegang tot informatie in het Engelse recht is constant in ontwikkeling geweest gedurende de afgelopen 30 jaar. Jurisprudentie en wetgeving hebben het afwisselend meer of minder ruim gedefinieerd. Deze beweging is vergeleken met een slinger die van een meer open naar een meer beperkt recht op toegang tot ongebruikte informatie beweegt.

In hoofdstuk 2 wordt het verschaffen van toegang tot informatie in het Italiaanse strafrechtelijke systeem beschreven en geanalyseerd. De procedure in het Italiaanse strafproces is interessant aangezien het strafprocesrecht van Italië vanuit een diep gewortelde inquisitoire traditie is overgegaan naar een procesrecht dat geïnspireerd is door accusatoire beginselen.
De karakteristieken van dit nieuwe strafvorderlijke systeem hebben belangrijke gevolgen voor de regulering van het verschaffen van toegang tot informatie aan de verdachte gedurende het strafproces.
Het onderzoek van de Italiaanse regeling van het verschaffen van toegang tot informatie laat zien dat, ondanks de beweerdelijke overgang naar een accusatoir model, het systeem nog steeds belangrijke kenmerken heeft van de inquisitoire traditie. Het systeem kent bijvoorbeeld, omdat het de waarheidsvinding niet volledig overlaat aan de partijen, een vrij sterke rechterlijke invloed. Die betreft onder andere de mogelijkheid van het inbrengen van bewijs. Indien dat nodig wordt geacht, kan dat ambtshalve door de rechters zelf geschieden. Daarnaast blijft de rol die door de aanklager wordt gespeeld dicht bij de inquisitoire traditie, hoewel het systeem formeel gesproken van hem verwacht dat hij als een partij opereert, net zoals ook de verdediging dat doet.

In hoofdstuk 3 wordt de regeling van het verschaffen van toegang tot informatie in het Franse strafrechtsstelsel onderzocht. Frankrijk is gekozen als vertegenwoordiger van de klassieke continentale rechtssystemen waarin het verschaffen van toegang tot informatie wordt bewerkstelligd door de verdachte toegang te geven tot het dossier waarin de resultaten van het onderzoek dat door de onderzoeksrechter is verricht, zijn verzameld.
Het verschaffen van toegang tot informatie, dat het recht van de verdachte

om geïnformeerd te worden over de beschuldigingen en het bewijs tegen hem effectueert, is een concept dat op gespannen voet lijkt te staan met de inquisitoire aard van het Franse vooronderzoek. Echter, uit het onderzoek blijkt dat recente veranderingen in de wet de rechtspositie van verdachten die van hun vrijheid benomen zijn verbeterd heeft met betrekking tot de informatie die aan hen verstrekt wordt.

In de hoofstukken 4 en 5 wordt de jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM) inzake het recht op een eerlijk proces zoals gegarandeerd door artikel 6 van het Europees Verdrag voor de Rechten van de Mens, en meer in het bijzonder ook inzake het recht op toegang tot informatie, onderzocht.
De analyse van de jurisprudentie van het Hof maakt het mogelijk om een aantal belangrijke aspecten te identificeren die de band met de mensenrechten benadrukken en laat zien op welke wijze die jurisprudentie heeft bijgedragenaan de ontwikkeling van het recht op toegang tot informatie in het strafproces. Hoewel het Straatsburgse Hof niet aangeeft welke vorm van regeling van het verschaffen van toegang tot informatie de voorkeur verdient, geeft het wel aan welke elementen van een strafproces strijdig zijn met het recht op een eerlijk proces en met het recht op toegang tot informatie.

In hoofdstuk 6 wordt het verschaffen van informatie in het rechtssysteem van Joegoslavië-tribunaal onderzocht. De regels van procesrecht en bewijs (RPE) van het tribunaal brachten bij de oprichting een strafproces tot stand dat in belangrijke mate op accusatoire leest was geschoeid. Dat procesrecht droeg echter niet bij aan een voorspoedige behandeling van zaken. Het aannemen van nieuwe regels van procesrecht en bewijs en diverse wijzigingen in de bestaande regels leidden er vanaf 1998 toe dat meer afstand werd genomen van de accusatoire uitgangspunten van de RPE.
Met betrekking tot het verschaffen van toegang tot informatie behield het Joegoslavië-tribunaal een accusatoire benadering, waarin het proces van verschaffing wordt beheerst door een verzameling technische regels.

In hoofdstuk 7 wordt de ontsluiting van informatie in het strafproces bij het Internationaal Strafhof onderzocht. De analyse wijst uit dat het systeem zoals dat door het Statuut van Rome en de regels van procesrecht en bewijs is gecreëerd belangrijke inquisitoire elementen kent. Deze elementen maken echter deel uit van een context waarin eigenschappen van de Angelsaksische rechtscultuur behouden zijn, zoals de *trial hearing* waarin de partijen hun zaken moeten presenteren en, belangrijker, de regulering van het verschaffen van toegang tot informatie door een verzameling technische regels.

Ten slotte bevat hoofdstuk 8 een rechtsvergelijkende analyse. Daarin worden de belangrijkste bevindingen met betrekking tot het verschaffen van toegang tot informatie in de verschillende strafrechtelijke procedures die zijn onderzocht, kort samengevat.
Bijzondere aandacht wordt daarbij geschonken aan moderne internationale strafrechtelijke procedures, met het oog op hun relatief korte bestaan alsmede

het voortdurende debat over de mogelijkheid om tot één gemeenschappelijk strafprocesrecht te komen dat toepasbaar zou zijn voor alle internationale strafhoven en -tribunalen. Uit het onderzoek vloeit voort dat de huidige regeling van het verschaffen van toegang tot informatie te ingewikkeld is en de voortgang van de procedures negatief beïnvloedt, terwijl zij tegelijk het recht van de verdediging op toegang tot informatie niet voldoende waarborgt.
Gepleit wordt voor het aannemen van een op inquisitoire leest geschoeide regeling van het verschaffen van toegang tot informatie, waarin de fase van het vooronderzoek en de ingewikkelde procesrechtelijke regels over het verschaffen van toegang tot informatie heroverwogen zouden moeten worden. Daarbij zou gekozen moeten worden voor een grotere rechterlijke bemoeienis en voor een benadering waarin gebruik wordt gemaakt van een dossier.

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Disclosure and the procedure regulating it represent a subject matter in which crime control and human rights find their synthesis. Disclosure is a complex subject that covers different branches of law as it involves aspects of a procedural nature as well as considerations that belong to the realm of human rights law.

This work scrutinises and evaluates the regulation of disclosure in five criminal procedural systems in order to gain knowledge of the different ways in which the disclosure of information can be achieved. Three of these systems are national (England, Italy and France) and two international (ICTY and ICC).

The jurisprudence of the ECtHR on the right to a fair trial and, more specifically, on the disclosure of information provides the background against which these systems and their disclosure processes can be assessed.

At the end of this process, an attempt is made to suggest possible improvements for the current regulation of disclosure. In this context, particular attention is paid to modern international criminal proceedings.

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